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No. 11583

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

BENJAMIN N. WILHITE,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 870 Brannan Street, San Francisco 5-28-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WOOD, MATTHIESSEN & WOOD,

ERSKINE WOOD,

LOFTON L. TATUM,
1310 Yeon Building,
Portland 4, Oregon,
For Appellant.

TANNER & CLARK,

EDWARD J. CLARK,
1041 Pacific Bldg.,
Portland 4, Oregon,
For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 3144

BENJAMIN N. WILHITE,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

LIBEL IN ADMIRALTY
(In Personam)

Libelant, for cause of action Civil and Maritime, in personam, in Admiralty, alleges:

Article I.

Libelant is a resident of the City of Portland, Multnomah County, Oregon; this suit is brought pursuant to the Suits in Admiralty Act (46 U.S.C.A. Section 742) and pursuant to Public Law 17, enacted by the 78th Congress, approved March 24, 1943, and General Order 32 made pursuant thereto.

Article II.

W. R. Chamberlin Company is now, and at all times herein mentioned has been, a corporation, duly organized and existing under and by virtue of the laws of the State of .....; the SS Franklin K. Lane is a merchant vessel, operated at all times herein alleged by said corporation, under a General

Agency Agreement with the respondent, United States of America, which was at all times the owner in control of said vessel, and libelant was at all said times an employee thereon of the respondent, employed through the War Shipping Administration of the United States.

Article III.

That on or about January 3, 1946, libelant signed on as carpenter with tools at Portland, Oregon, on the SS Franklin K. Lane, and on January 20, 1946, while said vessel was in and about to depart from the Port of Portland, Oregon, the libelant, pursuant to the ship's rules and [1*] within the duties of his employment, was required to do carpenter work upon said vessel wherever directed, and to care for the anchor, and was directed and ordered at said time and place to proceed with haste to the anchor; that in proceeding to said place in response to said order and direction, he was required to pass under two 6 x 6 timbers suspended under the gun deck on the after part of the ship by means of life rings; that one end of one of said timbers had been lowered, or had become lowered, with the result that the same did not afford passage for the claimant thereunder; that his head came in violent collision with said end of said timber, knocking him to the deck, and causing him the grievous injuries hereinafter more particularly referred to.

Article IV.

That the respondent, through the officers and crew

* Page numbering appearing at foot of page of original certified Transcript of Record.

in charge of said SS Franklin K. Lane, was careless and negligent in each of the following particulars:

(a) In not furnishing libelant a safe place in which to work, and in not having said ship seaworthy by having said end of said timber properly secured and lashed at a height which would permit the libelant to pass safely thereunder without collision therewith.

(b) In not warning the libelant of said unsafe and unseaworthy position of said timber.

Article V.

That as the proximate result of the careless and negligent acts as aforesaid, and because thereof, libelant's head came violently into collision with said lowered end of timber, knocking him to the deck and thereby causing severe injuries to his skull and brain, the exact extent of which injuries are to libelant unknown; that he thereby suffered a severe and unusual nervous and physical shock, and has suffered and still suffers a severe injury to his eyes and vision, and has suffered and still suffers continual noises in his head and strange [2] and unnatural feelings of pressure and distress with respect to his head, and has suffered and continues to suffer headaches, dizziness and fainting spells; that he was thereby caused great pain and suffering and will continue for a long time in the future to endure pain and suffering, and his earning power has been permanently impaired, and he has been

informed and verily believes, and therefore alleges, that he has been permanently injured, all to his damage in the sum of $30,000.00.

Article VI.

That libelant was at the time of receiving said injuries enjoying good health, and was a strong, ablebodied man, regularly employed, and earning approximately $350.00 per month; that as a result of said negligence of respondent, and because thereof, libelant has lost earnings in the sum of $3500.00; that he is further entitled to maintenance and cure beginning with the date of his injury in the sum of $1125.00 that he was taken from the ship at Vancouver, B. C., and has not received his transportation to Portland, Oregon, all to his further special damage in the sum of $20.00 for such transportation.

Article VII.

That heretofore and on February 26, 1946, libelant duly furnished a statement of his claim as required by said General Order No. 32, hereinabove referred to, to said W. R. Chamberlin Company, General Agent above named, and that more than sixty days have elapsed since the filing of said claim, without a notification in writing to libelant of a determination upon said claim, thereby permitting libelant to institute this libel.

Wherefore libelant prays judgment against respondent for the sum of Thirty Thousand ($30,000.00) Dollars general damages, for the sum of

$3500.00 special damages for lost earnings, for the sum of $1125.00 maintenance and cure, for the sum of $20.00 special damages for transportation from Vancouver, B. C. to Portland, Oregon, together with his costs and disbursements herein incurred.

TANNER & CLARK,
Proctors for Libelant.

State of Oregon,
County of Multnomah—ss.

Benjamin N. Wilhite, being first duly sworn, on oath deposes and says: That he is the libelant named herein; that he has read the foregoing libel and knows the contents thereof, and that the allegations thereof are true of his own knowledge except the allegations made on information and belief, and that as to those allegations he believes them to be true.

/s/ BENJAMIN N. WILHITE.

Subscribed and sworn to before me this 13th day of May, 1946.

[Seal] /s/ EDWARD J. CLARK,
Notary Public for Oregon.

My commission expires Sept. 14, 1946.

[Endorsed]: Filed May 13, 1946. [4]

[Title of District Court and Cause.]

ANSWER

Respondent, answering the libel in this cause, says:

Article I.

Admits the allegations of Article I.

Article II.

Admits all the allegations of Article II, except that this ship was operated by the corporation, W. R. Chamberlin & Co., and alleges the truth to be that said company performed certain services in respect to the ship under said Agency Agreement, but the operation was in the control of the owner of said vessel, the United States of America.

Article III.

Answering Article III of the libel, respondent denies knowledge or information sufficient to form a belief of the allegations thereof, except the following, which respondent admits, towit: That libelant signed on as carpenter at Portland, Oregon, not on January 3rd, as alleged, however, but on January 5, 1946.

Article IV.

Respondent denies the allegations of Article IV, and each of them.

Article V.

Respondent denies the allegations of Article V.

Article VI.

Respondent denies the allegations of Article VI, and admits was not paid transportation to Portland, Oregon. [5]

Article VII.

Respondent admits the allegations of Article VII.

Wherefore respondent prays that libelant take nothing, and that respondent have and recover its costs and disbursements herein.

/s/ HENRY L. HESS,
U. S. Atty.
/s/ WOOD, MATTHIESSEN & WOOD,
Proctors for Respondent.

State of Oregon,
County of Multnomah—ss.

I, Erskine Wood, being first duly sworn, say that I am the proctor who prepared this answer, from information furnished me by the respondent, and that the same is true, as I verily believe.

/s/ ERSKINE WOOD

/s/ LOFTON L. TATUM
Notary Public for Oregon.

My commission expires: May 7, 1947.

Subscribed and sworn to before me this 24 day of July, 1946.

[Seal]

Service of the within answer, by certified copy, at Portland, Oregon, this 26th day of June, 1946, is hereby admitted.

/s/ EDWARD J. CLARK
Of Proctors for Libelant.

[Endorsed]: Filed July 26, 1946. [6]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the undersigned Judge, sitting by designation, on Thursday the 16th day of January, 1947. Libelant was present in person and represented by his counsel K. C. Tanner, Esq., and Edward J. Clark, Esq., and the United States of America was represented by its counsel Erskine Wood, Esq., Erskine B. Wood, Esq., and Victor Harr, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of the parties hereto and at the conclusion of all of the evidence the parties rested and thereupon the cause was argued to the Court by the respective parties and the same was by the Court taken under advisement and the Court having considered all of the evidence introduced and the arguments of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That the libelant is and for some years last past has been a resident of the City of Portland, County of Multnomah, State and District of Oregon.

II.

That on or about the 3rd day of January, 1946, the respondent, the United States of America, was the owner and in control of the SS Franklin K. Lane, a merchant vessel. [7]

III.

That on or about the 3rd day of January, 1946, the libelant signed articles on the said SS Franklin K. Lane as a carpenter with tools at Portland, in the State and District of Oregon, at an agreed compensation or base rate of pay of $157.50, plus $10.00 for the rent of his said tools.

IV.

That there was on the 20th day of January, 1946, on the said ship a certain appliance constructed of two timbers approximately 6″ x 6″, the exact length not being established by the evidence, known as fog buoys and used at times while the ship was in motion at sea; when not in use the said timbers were secured by being lashed to the underside of the gun deck on said ship and the place of the lashing of the said timbers was so constructed that the timbers could be securely lashed and secured under

said gun deck in such a manner as to afford a clearance of approximately 7 feet to any person employed on the said ship as a member of the crew, desiring to use the passageway under said gun deck in going from one part of the ship to another in the performance of his duties; the said timbers were customarily so lashed on said vessel as to afford such clearance, and ordinary care required the owner and operator of the said vessel to so lash said timbers as to afford such clearance in the performance of the duties of such owner and operator of such vessel to afford to its employees and the members of its crew a safe place within which to work.

V.

That on the 20th day of January, 1946, the libelant was on board the SS Franklin K. Lane in the performance of his duties as a crew member and carpenter thereon, and was directed by the Chief Mate of the said vessel to proceed immediately from where he was to the anchor to perform some duty there. [8]

VI.

That at sometime prior to the giving of the order to the libelant one end of the fog buoy and timbers that had been theretofore lashed to the underside of the gun deck had been lowered by certain members of the crew in order that life buoys might be hung on the said timbers to be painted, and after lowering the end of the said timbers there was a

clearance of less than 6 feet to anyone attempting to use the passageway, over which the timbers were suspended, in going from one portion of the ship to the other; there was no sign given of the lowering of the said timbers, the passageway was in no manner closed off so as to prevent its use while the timbers were so lowered; there was no warning of any kind given to the libelant of the lowering of the said timbers or that there was no longer a clearance space of 7 feet under which a workman could pass and the libelant had no knowledge that the said timbers had been so lowered and the libelant, without knowledge that said timbers had been so lowered as aforesaid and believing they had been so lashed and secured as to afford ample head room to pass thereunder, immediately obeyed the order of the said Chief Mate and proceeded toward the anchor and in so doing his head came violently into collision with the lowered end of the said timber, staggering him for a few moments; he became dazed and dizzy and commenced to suffer with a headache; during the time herein mentioned the SS Franklin K. Lane was at the dock in Portland, Oregon, and during the afternoon of January 20, 1946, sailed and proceeded to Vancouver, British Columbia, where the libelant, still suffering from dizziness and headaches, received the attention of a physician and surgeon and on the advice of the said physician and surgeon left the said ship for medical treatment and was paid off on the 29th of January, 1946; libelant thereafter proceeded home

to Portland, Oregon, where he received medical care and attention for his injuries. [9]

VII.

That since the inflicting of the injuries upon him the libelant has suffered with headaches, ringing in his head and ears and with pain, and because thereof was unable to work or earn a living for himself for a period of four months after the 29th day of January, 1946, at which time his condition improved to a point where he was able to perform work at his trade as a carpenter.

VIII.

That there is no evidnece that the libelant suffered any fracture of the skull or a concussion, or any injury to the brain matter itself.

IX.

That the said ship completed its voyage at New Orleans, Louisiana, and the crew members were there paid off and but for the injuries sustained by the libelant he would have continued on said ship until the termination of its voyage for a period of four months and would have earned $167.50 per month for such four months.

X.

That there is no evidence from which the Court can determine what other sums, in addition to the said agreed wage of $167.50 per month, in the na-

ture of overtime and bonuses were earned by the carpenter on the said ship during the said voyage, or no evidence from which the Court can fix the amount thereof if the same were earned.

XI.

That the libelant was entitled to payment for his maintenance and cure for a period of four months after the 29th day of January, 1946, at the rate of $3.50 per day, no part or portion of which has been paid him.

XII.

That in causing the said timbers to be lowered as hereinabove set out, without giving to the libelant any warning thereof whatsoever, and without his knowledge, the respondent [10] was guilty of negligence and breached its duty to the libelant in not furnishing him a safe place within which to perform his work and duties; that the injuries inflicted upon the libelant coming into contact with said timbers and the damage caused thereby to the libelant in his loss of time, in his pain and suffering and inability to work, were and are a direct and proximate result of the said negligence of the respondent aforesaid and a direct and proximate cause of the damage sustained by the libelant.

XIII.

That the libelant has suffered and sustained damage generally, and in additional to the damages herein set out, in the sum of $2500.00.

From the foregoing Findings of Fact the Court draws the following

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction hereof.

II.

That because of the negligence of the respondent in failing to furnish the libelant a safe place to work and because of its breach of duty in that regard, the respondent has damaged the libelant in the following sums and amounts and the libelant is entitled to a judgment against the respondent in the sum of Four hundred twenty and no/100 ($420.00) Dollars for maintenance and cure, in the further sum of Six hundred seventy and no/100 ($670.00) Dollars for loss of wages and in the further sum of Twenty-five hundred and no/100 ($2500.00) Dollars as general damages, making a total sum of Three thousand five hundred and ninety and no/100 ($3590.00) Dollars, with interest thereon until paid at the rate provided by law, together with the libelant's costs of action necessarily incurred.

Let judgment be entered accordingly.

Done and dated this 22nd day of January, 1947.

/s/ R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed Jan. 22, 1947. [11]

In the District Court of the United States
for the District of Oregon

Civ. No. 3144

BENJAMIN N. WILHITE,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This cause heretofore came on regularly for trial before the undersigned judge, sitting by designation, on January 16, 1947, libelant appearing in person and by K. C. Tanner, Esquire, and Edward J. Clark, Esquire, his proctors, and respondent appearing by Erskine Wood, Esquire, Erskine B. Wood, Esquire, and Victor Harr, Esquire, Assistant United States Attorney, its proctors, and the cause having been tried and submitted, and the court having heretofore made and filed herein its findings of fact and conclusions of law separately, and directed the entry of appropriate decree, and it duly appearing that pursuant to said findings and conclusions decree should at this time be entered in favor of libelant and against respondent in the amounts hereinafter recited, and the court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that Benjamin N. Wilhite, libelant, have and recover of and

from the United States of America, respondent, the sum of Twenty Five Hundred ($2500.00) Dollars general damages, the further sum of Six Hundred Seventy ($670.00) Dollars special damages for loss of wages, the sum of Four Hundred Twenty ($420.00) Dollars for maintenance and cure, together with the further sum of $49.76 his costs and disbursements to be taxed as provided by law, and libelant have and he hereby is given interest on said decree at the rate of 4% per annum until paid.

Dated in open court January 23rd, 1947.

/s/ R. LEWIS BROWN,
Judge.

Have not seen Court's findings, but acknowledge receipt of copy of above.

/s/ ERSKINE WOOD 1/22/47

[Endorsed]: Filed 1/23/47. [12]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable above entitled Court:

Your petitioner, the respondent, United States of America, prays that it may be allowed to appeal from the final decree entered in this court and cause on the 23rd of January, 1947, to the United States Circuit Court of Appeals for the Ninth Circuit, and that no supersedeas bond be required, in view of

the identity of your petitioner, and that the usual Apostles on Appeal be sent to said United States Circuit Court of Appeals, and that the usual Citation issue in order that said decree may be fully reviewed and modified or reversed as to the said Circuit Court of Appeals may seem just and in accordance with the Assignment of Error filed herewith.

And your petitioner will ever pray.

Dated March 12, 1947.

s/ HENRY L. HESS

/s/ WOOD, MATTHIESSEN & WOOD

/s/ ERSKINE WOOD
Proctors for Respondent.

It Is Ordered that the appeal herein be allowed as prayed for, and that no supersedeas bond be required.

Dated March 14th, 1947.

/s/ CLAUDE McCOLLOCH,
District Judge.

Service accepted March 14, 1947.

/s/ EDWARD J. CLARK,
Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [13]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent appealing from the final decree entered in this court and cause on January 23, 1947, makes the following Assignments of Error:—

1. The trial court erred in holding the respondent liable at all in damages.

2. If the respondent was liable at all, nevertheless the trial court erred in allowing libelant $2500.00 general damages, the same being excessive.

3. If the respondent was negligent, the trial court erred in not finding that the libelant was guilty of contributory negligence.

4. The trial court erred in allowing libelant $670.00 wages and $420.00 for maintenance and cure, the same being excessive.

/s/ HENRY L. HESS

WOOD, MATTHIESSEN & WOOD

/s/ ERSKINE WOOD

Proctors for Respondent.

Service accepted March 14, 1947.

/s/ EDWARD J. CLARK

Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [14]

District Court of the United States of America
District of Oregon

CITATION ON APPEAL

To Benjamin N. Wilhite, Libelant,
and Messrs. Tanner and Clark, his Proctors,
Greeting:

Whereas, United States of America, respondent in Cause No. Civ. 3144, entitled Benjamin N. Wilhite, Libelant vs. United States of America, Respondent, in said Court, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in said Cause in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You Are Therefore Hereby Cited And Admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within forty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 14th day of March, in the year of our Lord, one thousand nine hundred and forty-seven.

/s/ CLAUDE McCOLLOCH,
Judge.

Due service accepted on March 14, 1947.

/s/ EDWARD J. CLARK
Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [15]

[Title of District Court and Cause.]

DESIGNATION OF APOSTLES

To the Clerk:

Sir:

Will you please prepare the Apostles in this case, and include therein the following:

1. Libel (as amended by interlineation)
2. Answer (as amended by deletion)
3. Transcript of the Evidence
4. Findings of Fact and Conclusion
5. Decree
6. Petition for Appeal, and Order allowing same.
7. Assignments of Error
8. Citation on Appeal.

Respectfully yours,

/s/ ERSKINE WOOD
Of Proctors for Respondent.

Service of the within, by certified copy, at Portland, Oregon, this 15th day of March, 1947, is hereby admitted.

/s/ EDWARD J. CLARK
Of Proctors for Libelant.

[Endorsed]: Filed March 15, 1947. [16]

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

May 13—Filed libel in Admiralty.

May 13—Issued monition—to marshal.

May 18—Filed monition.

July 16—Filed deposition of Benjamin N. Wilhite.

July 26—Filed answer.

1947

Jan. 7—Entered order setting for trial on Jan. 16, 1947 notices McC.

Jan. 15—Issued subpoena and 2 copies to Mr. Clark

Jan. 16—Record of final hearing and order allowing libelant and respondent to amend pleadings by interlineation — submitted. J. Brown.

Jan. 20—Filed subpoena with marshal's return.

Jan. 22—Filed and entered findings of fact and conclusions of law. J. Brown.

Jan. 23—Filed and entered Decree for Libelant. J. Brown.

Jan. 23—Filed and entered cost bill of libelant and notice of date of taxation.

Mar. 14—Filed petition for appeal, by U. S.

Mar. 14—Filed assignments of error.

Mar. 14—Filed citation on appeal.

Mar. 15—Filed designation of apostles.

Apr. 8—Filed transcript of proceedings in duplicate of January 16, 1947. [17]

CERTIFICATE TO TRANSCRIPT

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3144, in which United States of America is defendant and appellant and Benjamin N. Wilhite is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of apostles of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated January 16, 1947.

I further certify that the cost of comparing and certifying the within transcript is $20.40 and that the same has been paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 10th day of April, 1947.

[Seal] LOWELL MUNDORFF, Clerk.
/s/ By F. L. BUCK,
Chief Deputy. [18]

[Title of District Court and Cause.]

Portland, Oregon, Thursday, Jan. 16, 1947,
10:00 a.m.

Before: Honorable R. Lewis Brown,
Judge.

Appearances:

Messrs. K. C. Tanner and Edward J. Clark, Proctors for Libelant;

Messrs. Erskine Wood, Erskine B. Wood and Victor E. Harr, of Proctors for Respondent.

PROCEEDINGS:

The Court: Number 3144, Benjamin N. Wilhite vs. the United States: Are the parties ready?

Mr. Tanner: The Libelant is ready, yes, sir.

The Court: All right, proceed.

Mr. Erskine Wood: I would like to ask leave to make a minor amendment in the Respondent's answer, Article VI. The Libelant alleges that the Libelant was taken from the ship at Vancouver, B.C., and in Article VI that is admitted, but it is phrased somewhat ambiguously.

The Court: It is denied, isn't it, in Article VI, "except that libelant"?

Mr. Erskine Wood: "except that libelant".

The Court: That is right.

Mr. Erskine Wood: I think the Libelant will probably admit that he left the ship by mutual consent, and therefore I do not want this admission to stand as it is. I would like to amend it to

say that it is denied that he was taken from the ship, except that it is alleged that he left by mutual consent.

Mr. Tanner: I thought I furnished you, Mr. Wood, with the clinical abstract from the doctors. We will have that. I usually furnish these things.

Mr. Erskine Wood: Well, of course, that doesn't make any difference. That is the Libelant's statement about what happened. I think there can be no harm in allowing some minor amendment. I ask that it be done, your Honor.

The Court: Very well, the amendment may be made. Is [2*] it written out? Or the amendment will be made by interlineation by the Clerk. You will step up to the Clerk's desk and give him the language you want.

Mr. Erskine Wood: Shall I do it right now?

The Court: Better do it right now.

(Mr. Erskine Wood approached the Clerk's desk and conversed with the Clerk in an undertone.)

Mr. Erskine Wood: I think that will cover it. I merely scratched out the exception and added the words that we admit that he was not furnished transportation.

Mr. Tanner: Now, we have out pre-trial order prepared and it has been served on——

Mr. Erskine Wood: It was only served on me yesterday afternoon and it is not entirely acceptable to me. If your Honor please, the pre-trial order, I think, is discretionary with your Honor,

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

whether you make it or not, in an admiralty case, and it practically follows the allegations of their libel and our answer, with some minor differences. I see no reason for a pre-trial order, but if there is going to be one I would have to ask that that be modified in some of its phraseology. I don't see that we need one.

The Court: Let me see the proposed pre-trial order.

Mr. Erskine Wood: Do you want a pre-trial order?

Mr. Tanner: We won't insist on it, of course. We [3] would want our clinical abstract to be marked as a pre-trial exhibit, so that there is no question about its admissibility.

The Court: Let me see the pre-trial order.

Mr. Tanner: The primary reason for our pre-trial is to fill in the omissions, to make up the omissions that are contained in the reply. We didn't know what our special damages were when it was filed and we didn't have the amount of our expense, and that is primarily all that is in the pre-trial order.

The Court: Well, the case is set for final hearing. If a pre-trial conference had been desired I think that a motion for that prior to the time of the setting of the case for final hearing would have been sustained, so we will proceed with the trial of the case.

Mr. Tanner: Well, then can I amend the reply by filling up the blank spaces in accordance with the figures that are contained in our pre-trial order?

Mr. Erskine Wood: No objection to his filling up the spaces, your Honor.

The Court: Very well.

Mr. Erskine Wood: But before we proceed I want to make a short statement that really is to serve notice on counsel——

The Court: Counsel, I think we had better get these [4] pleadings in shape. We will do one thing at a time.

Mr. Erskine Wood: Very well.

The Court: You have consented to his filling in those spaces.

Mr. Tanner: One other change: We would like to change the 21st to the 20th. We have made an error there of one day, on the first page, Article III of the libel. That should be the 20th instead of the 21st. May we have that change, your Honor?

The Court: Very well. Proceed.

Mr. Erskine Wood: May I make a statement now, your Honor?

The Court: Proceed.

Mr. Erskine Wood: We have no objection to them inserting those amounts in there.

This accident is claimed to have happened to this man here in Portland and he left the vessel at Vancouver, B.C., and there, as I understand, went to a doctor. Now, the Libelant, so far as I know, has made no attempt to take that doctor's testimony, and that doctor's testimony, since he was the one that examined the man first, it seems to me is important to have and it is part of Libelant's case. Now, it may be that Libelant will testify here in

court, so that we don't care about taking that deposition, maybe we will accept his testimony, but, depending on what the Libelant [5] now says in court, if he fails to produce that testimony we shall ask leave to take that deposition in Vancouver within, say, a week.

The Court: Well, what reason do you give for not having taken a deposition and being prepared to have the case set for trial? You have an equal opportunity to take the deposition with the Libelant, if you so desire.

Mr. Erskine Wood: Well, we regard it as part of their case, as to damages.

The Court: That may be true, but if his testimony is part of your case at some time it would have been different. It might be said to be part of your case to disprove his damages.

Mr. Erskine Wood: Well, it is possible that we have been dilatory in not trying to do it. As a matter of fact, I didn't learn until about day before yesterday what the situation was up in Vancouver. I think we can defer a ruling on that, but I would like to give that notice now.

The Court: Proceed with the trial of the case.

Mr. Tanner: Does your Honor care to have a general opening statement, a brief opening statement?

The Court: No. I have read the pleadings. They are simple. Unless there is something additional that you desire to call my attention to that is not contained in the pleadings. [6]

Mr. Tanner: Well, I believe I have the master

of the vessel here. I don't want to keep him waiting. It might be helpful. Captain Carlsen, will you take the stand.

LOREN CARLSEN

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

Mr. Carlsen: Loren Carlsen.

The Clerk: Loren Carlsen.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Loren Carlsen?

A. Yes, sir.

Q. And what is your occupation?

A. I am a merchant seaman. I have been employed as a master of merchant marine vessels.

Q. And how long have you been employed as a master of merchant vessels?

A. Oh, approximately two years.

Q. And prior to that time what was your work?

A. I was also employed in the merchant marine in various [7] capacities, working my way up.

Q. And you worked up through what stages, so far as ratings were concerned?

A. Well, what one starts at, as an ordinary sea-

(Testimony of Loren Carlsen.)

man, and an able-bodied seaman, third mate, second mate, chief mate, and finally master.

Q. And the time from the ordinary seaman to an able-bodied seaman requires what routine of service?

A. It varies considerably, but it can be done in several years, but in my case a period of about ten years.

Q. In your case you served about ten years as an ordinary, and then you were rated as an able-bodied seaman?

A. No, the entire time at sea.

Q. I see; the entire time at sea, you made those various promotions? A. Yes.

Q. Are you familiar, Captain Carlsen, with the use to which the timbers that were towed aft of the vessels were put? What was the purpose of those timbers while they were in use?

A. I don't quite get your question.

Q. Well, let me ask you—there isn't any dispute about this; this may be a little leading—but during the war these merchant vessels had on deck some timbers with some metal pins attached to the rear of them, did they not, [8] Captain?

A. Yes. They were called fog buoys. They weren't used very much. They were used to keep one's position in the convoy. They were trailed over the stern, several hundred yards to the stern of the vessel, and the following vessels would see the wake of the vessel. It is called a fog buoy. It is a timber, I should say, oh, about twelve or four-

(Testimony of Loren Carlsen.)

teen feet long. There were several kinds of them made. The idea of them was to create a wake in the water that was visible to another vessel.

Q. You eliminated by that the use of a fog horn that was used ordinarily in peacetime, is that right?

A. No, that was used under certain circumstances also, but convoys ordinarily kept in columns and on dark nights all vessels darkened out, the stern of the ship ahead was difficult to see, but if several hundred yards astern of that ship these fog buoys were there—it wasn't always used in fogs, but sometimes in other bad weather—why, you would see the wake of this fog buoy.

Q. You said it was twelve or fourteen feet long. Will you give us the dimensions otherwise—that is, the size of it.

A. Well, since they weren't used very much, I couldn't accurately say, except that one type was, I would say, made of, oh, either a 4 x 4 or 4 x 6 or so in dimension; and [9] they had another type that was merely a short one, several feet in length, and—well, it is quite difficult to explain the mechanics of it. It had a fin on one end of it, and that fin dug down into the water and threw a spray of water up above the surface that was quite visible for a distance.

Q. When it wasn't in use where was it ordinarily kept?

A. Well, the heavier types—they weren't extremely heavy—they were kept aft, and it was direct over the stern, so it would be stowed somewhere aft,

(Testimony of Loren Carlsen.)

depending on what space was available and on the type of the ship.

Q. On a Liberty ship do you know where they were put?

A. Well, I have seen some stowed forward of the house on the deck—that is, the afterhouse—and some were lashed overhead in some convenient distance——

Q. When they were lashed overhead, what was the clearance overhead when they were properly lashed?

A. Well, in some places they were lashed so it wasn't necessary for a person to be near it at all—I mean it wasn't in a position where anyone would have any business by it at all, but the deck above you was a gun deck on a Liberty ship, the after gun deck, and that was, oh, I would say about seven feet in height from the main deck to the——

Q. So it was lashed right up against——

The Court: Just a minute, Counsel. Let the witness [10] complete his answer.

Mr. Tanner: Excuse me, your Honor. Go ahead.

A. There was a clearance of possibly seven feet from the deck to the stiffener or beam forming the gun deck above you, roughly. I don't know exactly. This is memory.

Q. And were they lashed, when they were properly lashed, right up against the ceiling.

A. Well, they would be, they could be, but not necessarily. I mean by that that there's so many

(Testimony of Loren Carlsen.)

places that you could stow a thing on a ship, but if you did lash anything you would lash it in the clear and leave a passageway for someone. That is the general idea.

Q. Would you say that would be the ordinary and usual practice, of providing such a clearance?

Mr. Erskine Wood: Just a moment. I object to that question as too vague, and the witness has said they stow these in so many different places according to the convenience of the vessel, and I don't know just what counsel's question——

Q. (By Mr. Tanner): Captain Carlsen, when they used the bottom part or the ceiling of the gun turret to lash it, what was the usual and ordinary practice of providing clearance for men to pass aft on the ship?

A. Well, I would say any place in the stern that is frequented by the crew, even if there was a good six-foot-six [11] clearance it wouldn't be safe, because a tall person walking aft in the dark would possibly injure himself.

Q. Now, how long have you known Mr. Wilhite?

A. I have known him about four years.

Q. And have you sailed with him?

A. Yes, I sailed with—I don't know whether you want further——

Q. Go ahead, now, tell us your associations with him and how well you have known him.

A. While I was employed as a third mate on a Liberty vessel that sailed out of Portland, Mr. Wilhite was carpenter on that ship, and I think the

(Testimony of Loren Carlsen.)

voyage, counting the shore time, from my memory we left the States in June of 1942 and returned shortly after Christmas of that year—in other words, the voyage was, roughly, about seven months, counting our port time along the coast, and during that time I saw a great deal of Mr. Wilhite, because there weren't many facilities ashore for—in other words, we spent a great deal of time on the ship, and when on deck, of course, Mr. Wilhite, employed as carpenter on the ship, would be about deck a great deal. In fact, I saw him ashore many times and went ashore with him, got to know him very well and knew him very well.

Q. Now, after the conclusion of that voyage did you have occasion to see him frequently?

A. Yes, I saw him a number of times in Portland. He was [12] on one ship where I was chief mate, he was employed on some repair or alterations aboard the ship, and I saw him then, and I saw him in his home, and, oh, I would say five or six times.

Q. Now, prior to January of last year, of 1946, and prior to January 20th, do you recall when it was immediately—that is, the day of the accident that is involved in this case here, Captain Carlsen, do you know, could you tell us about how long it was before this accident that you last saw him?

A. The accident was in January?

Q. Yes, in January of 1946. That is just about a year ago.

A. I saw him some time the latter part of No-

(Testimony of Loren Carlsen.)

vember of that year. I was down in Portland for several trips. The exact date I don't know, but it must have been somewhere near the last half of the month.

Q. And what would you say as to whether or not you were well acquainted with him prior to that time?

A. Oh, yes, I knew him well.

Q. You had had occasion to converse with him on a number of occasions?

A. Yes, and when I did see him we had quite a long talk together and talked over the trips we had made—the trip we had made, and the persons we knew, and some of his shipmates, so I think I spent about an hour with him at that [13] time, the latter part of November.

Q. Now, when was it that you saw him after he was hurt?

A. I don't know exactly. It is approximately the first half of April. I returned——

Q. Where did you see him then, do you recall?

A. Oh, I saw him in his home and I saw him downtown.

Q. Now, did you notice any difference in him in his general condition?

A. At first I wasn't aware consciously, but one thing I noticed, that he—I mentioned certain persons that both of us knew quite well and he didn't seem to remember much about them; in other words, it seemed as though his memory was a little vague and that—well, just his general appearance; he

(Testimony of Loren Carlsen.)

didn't seem to be alert mentally as much as he always had been before.

Q. And how was he physically, with reference to his alertness and his general physical condition? What did you notice?

A. Well, I had known him to be very active, in fact more active than most young fellows that I know, and I noticed that he was very sluggish, and I didn't know the reason for it at the time, and, being no doctor, I could just say that I could see something had happened, I didn't know what, but I know very well that he was a different man.

Mr. Tanner: You may cross examine. [14]

Cross Examination

By Mr. Erskine Wood:

Q. Did Mr. Wilhite tell you that he had had any kind of an accident?

A. Yes, he did tell me, but not at first. He told me he had had an accident. He didn't tell me many of the particulars of it.

Q. It was after he told you he had had some kind of an accident, it was then that you got this idea that he wasn't quite as alert as previously, was it?

A. No, because he didn't try to talk to me and try to describe his condition at all. In fact, I couldn't remember where he was hurt, or what ship, or anything.

Q. Did he tell you how he was hurt, allegedly?

(Testimony of Loren Carlsen.)

A. He told me, but he couldn't have gone into much detail, because I don't even remember. I know he was struck by something. My opinion is that he was hit by something that dropped. He didn't tell me that. And, as I say, we had other things to talk about and I wasn't trying to find out just all about his accident?

Q. You and Mr. Wilhite aren't neighbors?

A. No, sir.

Q. But you have known him four years or more?

A. Well, let's see—'42—this is '47—about four and a half years. [15]

Q. What ship were you third mate on, Captain, out of Portland? A. Henry D. Thoreau.

Q. What ship were you first mate on?

A. I was first mate on several ships——

Q. I thought you mentioned one that you were first mate on with him.

A. Yes, the Mary Kinney, here in Portland. She was built here and I was mate on her, and we were going offshore; I was transferred two weeks later down at San Francisco.

Q. Have you had a ship of your own as master?

A. Yes, two of them.

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you, Captain Carlsen.

(Witness excused.) [16]

THOMAS EDWARD GILL

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

Mr. Gill: Thomas Edward Gill.

The Clerk: G-i-l-l?

Mr. Gill: Yes, sir.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Thomas Gill?

A. Yes, sir.

Q. And what is your occupation, Mr. Gill?

A. I am a merchant seaman.

Q. And do you have any rating in that occupation? A. Yes, sir.

Q. What is your rating?

A. Able-bodied seaman, boatswain and winch tender.

Q. Could you tell us generally what a boatswain is and where he fits into the crew of a vessel, or how he fits in?

A. He runs the deck department, the maintenance of a ship. He is the boss from the mate. He takes his orders from the chief officer.

Q. Takes his orders from the chief mate, and then he——

A. He lays out the work for the crew. [17]

(Testimony of Thomas Edward Gill.)

Q. He lays out the work for the crew. How long have you been a seaman, Mr. Gill?

A. Twenty-seven years.

Q. And how long were you an ordinary seaman before you received your rating as an A.B.?

A. Three years.

Q. Now, did you have occasion to sign on or be on the S.S. Franklin K. Lane? A. Yes, sir.

Q. In January of last year?

A. I was boatswain of the Franklin K. Lane from January 6th to the 20th.

Q. Mr. Gill, was the Franklin K. Lane equipped with a device that was towed after the vessel for use in bad weather and foggy weather, conditions that way, to create a wake?

A. Yes, sir, she was.

Q. Was equipped with that type of a device?

A. Yes, sir.

Q. Where was that device kept on that vessel?

A. It was lashed to the overhead underneath the gun deck on the fantail.

Q. When it was in proper position I will ask you whether or not there was adequate clearance for men to use the companion way in their quarters on the afterdeck of the vessel? [18]

A. When it was properly secured, it was.

Q. Now, I will ask you, Mr. Gill, if you witnessed an accident on or about the 20th of January, 1946, in which the Libelant here, Mr. Wilhite, was involved? A. Yes, sir, I witnesed it.

Q. All right, where were you when it occurred?

(Testimony of Thomas Edward Gill.)

A. I was standing just about six feet from him when he came around the house and ran into it.

Q. Do you know where he was going and what instructions he had received immediately prior to that time?

A. The mate had sent one of the sailors back to tell him to stand by the windlass, a hurry-up call.

Q. You heard that order given to Mr. Wilhite, did you? A. Yes, sir.

Q. And after he received that order what did you observe him do?

A. He started hurrying around the house, and the fog spar was down.

Q. You call that the fog spar?

A. Fog spar or fog buoy, either.

Q. Would you tell us what gait he was moving when he struck that?

A. Well, he wasn't running. He was hurrying real fast.

Q. How much had it been lowered?

A. It had been lowered about six or eight inches, so they [19] could attach some lines to it, to paint them.

Q. Now, whenever they have occasion to lower an appliance or a device of that kind under those circumstances, what are the usual and ordinary precautions that are taken, if any?

A. You usually put an obstruction there or you tie a line across so that a man can see that there is something to watch for when he is going through

(Testimony of Thomas Edward Gill.)

that area; either that or you have a man there to stand to watch it and warn people.

Q. Was there any warning given to Mr. Wilhite?

A. No, sir, there wasn't. I didn't know that they had lowered the fog buoys or I would have had a line there myself. That is one of my jobs.

Q. Do you know who lowered it?

A. No, I don't know who done it, but I had sent two men back there to paint the life buoys and they had lowered it down so they could tie the rings up with it.

Q. And there was no warning any place?

A. No, sir, there wasn't.

Q. Now, I will ask you whether or not the passageway that he was using in response to the order that he had received was a proper passageway for a member of the crew to use?

A. It was, yes, sir.

Mr. Tanner: You may cross examine. [20]

Cross Examination

By Mr. Erskine Wood:

Q. Mr. Gill, how far is it from the after deckhouse to the stern of the ship?

A. From the bulkhead of the after deckhouse to the stern of the ship?

Q. Yes, sir.

A. It is just about twenty feet, sir.

Q. About twenty feet?

A. About twenty feet.

Q. And the after gun platform extending over the fantail is about ten feet, is it not?

(Testimony of Thomas Edward Gill.)

A. About ten or twelve feet.

Q. And it was under that after gun platform that this spare buoy was suspended, was it?

A. Yes, sir.

Q. Was the after gun platform supported by channel beams or irons of some sort?

A. Under the center it has one channel iron.

Q. And the clearance, I think a previous witness testified, was about seven feet from that channel iron to the deck?

A. Yes, sir, just about seven feet clearance.

Q. And when the fog buoy, assuming it was a 4 by 6, was lashed in place it would be, you contend, tight up against the gun turret? [21]

A. Tight up against the channel iron.

Q. So that if it were lowered six or eight inches it would leave a clearance there of nearly six feet, wouldn't it?

A. A little bit better than six feet; about six and a half feet.

Q. Even when it was lowered?

A. No, when it was lowered it would be less than six feet.

Q. You said it had been lowered about six inches.

A. That would bring it down to about six feet or a little less.

Q. Now, just exactly where were you when you say you saw him hit the beam?

A. I was standing just around the port side of the house, facing aft.

Q. Facing aft? A. Yes, sir.

(Testimony of Thomas Edward Gill.)

Q. How wide is the ship at that point?

A. It isn't very wide. There is a companionway on each side of the ship. At that point where I was standing I will say it was about four feet from the gunwale to the house.

Q. How wide is the after deckhouse?

A. Well, I don't know. I have never measured it. I don't know the dimensions of it on a Liberty ship, right close.

Q. Isn't that passageway fore and aft on each side of the deckhouse about six or eight feet wide?

A. No, sir, it isn't.

Q. What?

A. Not at the point on the after end of the house it isn't.

Q. A man passing from the port side of the ship to the starboard side of the ship—that is what Wilhite was doing, wasn't it?

A. Yes, sir, he was going around the house.

Q. He had a passageway there about twenty feet wide to pass through, didn't he—that is, from the after bulkhead of the deckhouse to the stern of the ship?

A. Well, he wouldn't go clear around the stern. He is going right around the after end of the house, where the passageway is.

Q. There was a 20-foot-wide space he could have used, wasn't there? A. Yes, there was.

Q. Now, who gave you this order to come forward to stand by the anchor?

A. The chief officer issued an order to a sailor

(Testimony of Thomas Edward Gill.)

to call the carpenter to come back and stand by and hurry.

Q. Did you hear the order given?

A. Yes.

Q. What did you hear said?

A. He said, "The chief officer wants you by the anchor, and [23] hurry up."

Q. Was she laying at the harbor here in Portland? A. She was laying at the dock.

Q. So there was no emergency, was there?

A. I don't know. You never can tell when there is an emergency on a ship. When you are on one end you have somebody tell you to hurry and stand by something forward.

Q. At any rate, the ship was tied by a line at the dock; you admit that?

A. Yes, she was tied at the dock.

Mr. Tanner: There wasn't any storm; we admit that.

Q. (By Mr. Erskine Wood): Now, just what was Wilhite doing when he got this order?

A. I don't remember exactly what he was doing.

Q. When he received the order he started——

A. He immediately started forward in a hurry.

Q. Forward?

A. Started around the house.

Q. Why did he go around the deckhouse instead of immediately forward?

A. Because he was going up the starboard side of the ship. The ship was with the starboard side to the dock.

(Testimony of Thomas Edward Gill.)

Q. And he was standing on the port side of the ship? [24] A. Yes, right close to me.

Q. But there was a fore-and-aft passageway there on the port side for him to go forward without passing underneath this junk platform at all, wasn't there? A. Yes.

Q. Now, you as the boatswain were in charge of this work, weren't you? A. I was, yes, sir.

Q. And were these sailors that you had told to paint the life rings, were they painting them at the time?

A. They were hanging them up to paint them, yes.

Q. You saw them doing that?

A. Yes, I saw them doing it.

Q. And you saw them hanging onto this fog buoy, did you? A. Yes.

Q. Then you must have seen that the fog buoy was lowered some?

A. I didn't notice it at the time, no.

Q. Didn't notice it? A. No, sir.

Q. How do they hang those life rings over the buoy?

A. They pass a rope over the top of them and they just hang them up on the deck. That is why they had lowered the fog spar, to pass the line over the top. [25]

Q. Do you know how wide or broad the life rings are in diameter?

A. They are about 36 inches in diameter.

(Testimony of Thomas Edward Gill.)

Q. How many of them were hanging there? Approximately? I don't mean to tie you down——

A. I don't remember, but on a ship there's—there's nine altogether on a ship. That is called for by the U. S. Inspectors.

Q. Were you engaged in any particular job at the time yourself?

A. No, sir, I was not.

Q. You were just overseeing things?

A. Just overseeing the work.

Q. And, although you were overseeing things, you now say you did not notice what these painters were doing or how the fog buoy looked?

A. No, sir, I did not. The reason I didn't notice very much that day was because I had just received word that my mother had fell and broke her leg and I was trying to get off the ship.

Q. You did leave the ship on that day, I think.

A. I did, yes, sir.

Q. Now, you say that if there is not sufficient headroom in a passageway a line should be put across it? A. Yes, sir.

Q. Or a man should be stationed there? [26]

A. Yes, sir.

Q. And you saw that no line was put there or no man was stationed there at this time, didn't you? You observed that, didn't you?

A. Yes, I observed that, but I didn't think that at the time; I was too worried myself.

Q. What time did you leave the ship that day, Mr. Gill?

(Testimony of Thomas Edward Gill.)

A. It was some time right just shortly after lunch.

Q. Shortly after lunch? A. Yes, sir.

Q. And didn't come back? A. No.

Q. Well, would you say one or two o'clock is when you left?

A. I was in the U. S. Commissioner's office at two o'clock to be paid off.

Q. And that was after you left the ship?

A. Yes, sir; I ran from the ship straight up there to be paid off.

Q. Now, you say you hadn't observed that this fog buoy had been lowered six or eight inches, but you did see the man hanging the life rings to it, didn't you? A. Yes, sir.

Q. Before the accident? A. Yes, sir. [27]

Q. So those life rings were going to hang down at least 36 inches below the fog boom, weren't they?

A. Yes, sir.

Q. They necessarily would obstruct any passageway there?

A. No, sir, they didn't. They were hung from the after end of it.

Q. How far away from the deckhouse were they?

A. Well, I will say about four or five feet.

Q. Four or five feet? A. Four or five.

Q. So there was a clear passageway next to the deckhouse, unobstructed by any life rings, and with a headroom of approximately six feet, wasn't there?

(Testimony of Thomas Edward Gill.)

A. I don't know exactly how far the buoys had been lowered down.

Q. What?

A. I don't know how far the buoys had been lowered down.

Q. Well, I don't care how far they were lowered down. You said they were tied up close to the fog buoy and they were 36 inches in diameter; but what I mean, if they were five feet away from the after bulkhead of the deckhouse there was at least five feet of passageway there of approximately six feet, wasn't there?

A. There should have been, yes. [28]

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you.

(Witness excused.)

BENJAMIN N. WILHITE

the Libelant herein, was thereupon produced as a witness on his own behalf and was examined and testified as follows:

The Clerk: Your name is Benjamin N. Wilhite?

Mr. Wilhite: Yes, sir.

(The witness was thereupon duly swor

Direct Examination

By Mr. Tanner:

at day,

Q. Your name is Benjamin N. Wilhite?

A. Yes, sir.

(Testimony of Benjamin N. Wilhite.)

Q. And you are the Libelant in this case, are you? A. Yes, sir.

Q. Mr. Wilhite, how old are you?

A. Sixty-two.

Q. What is your occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. Off and on, for forty years.

Q. For forty years; and have you done your carpenter work [29] in the maritime industry?

A. I was on a ship, off and on, since '42. That was all I was——

Q. You started to go into the maritime industry with your skill as result of the war, is that right, Mr. Wilhite? A. That is right.

Q. But prior to the war you worked at what job of carpenter work?

A. Well, superintendent, mostly, of construction.

Q. Of construction work? A. Yes.

Q. Now, Mr. Wilhite, you went into the maritime work in 1942?

A. That is right.

Q. And what was your first employment there, on what vessel? A. The Henry D. Thoreau.

Q. You were on that vessel for how long?

A. Approximately seven months.

Q. And then you were on what other vessel?

A. The Wide Awake.

Q. [illegible] what? A. The Wide Awake.

a headr[illegible]e Wide Awake? A. Yes. [30]

Q. Then what was your next assignment?

(Testimony of Benjamin N. Wilhite.)

A. The Franklin K. Lane.

Q. The Franklin K. Lane; and that is the vessel that is involved in this hearing?

A. That is right.

Q. Were you engaged as a carpenter on all of those vessels? A. Yes, sir.

Q. And did you sign on as an A.B. or Ordinary? What did they give you?

A. Well, just the rating of a carpenter, I guess.

Q. They just gave you the rating of a carpenter and to do the carpenter work?

A. That is right.

Q. Now, Mr. Wilhite, just immediately prior to the time you got hurt, just before that time, when you were on the Franklin K. Lane, what were you doing?

A. I was looking after my work back there, checking up on—I did oiling on some of these—I forgot what the boys call them. They use them to moor the ship up. They are a pulley, I call them—and I was checking on them and seeking everything was in order so as to get ready to go.

Q. You were getting ready to sail on another voyage, is that right? A. That is right. [31]

Q. All right, now, Mr. Wilhite, what orders did you get while you were doing that?

A. Well, I was back aft and one of the seamen came and he came down the starboard side and hollered at me and said the mate wanted me forward to stand by the winch immediately, so I dropped what I had and I started.

(Testimony of Benjamin N. Wilhite.)

Q. And what happened?

A. I came in contact with this beam.

Q. You came in contact with this beam. How many steps would say say you had taken before you came in contact with it?

A. Oh, not very many. I don't remember.

Q. Well, about what distance would you say you think you went?

A. Well, the aft of the ship, there's about thirty feet there at that point, so I imagine about two or three steps, something like that.

Q. You had just got started?

A. That is right.

Q. All right, what part of your body came in contact with it?

A. Just the back of my head there.

Q. Just your head?

A. Right there, yes (indicating).

Q. And what happened, would you tell us? Did it stop you, [32] or what happened?

A. Well, I staggered for a few minutes, and the boys laughed at me, and, as near as I can remember, I made it up to the anchor all right, but I was pretty dazed. I didn't say anything, because I really wanted to make the trip. It was going to the East, and I never had been over in that part of the country and I wanted to make the trip, and I kept still as much as possible.

Q. How did you feel?

A. Well, I felt pretty dizzy, but it was late in the evening and we knocked off pretty soon, as

(Testimony of Benjamin N. Wilhite.)

quick as we got away from shore, and I went to my bunk and I stayed there that night and most of the next day.

Q. When did you arrive up at Vancouver, do you know?

A. We left here along late in the afternoon, I would say about four or four-thirty, and we got in Vancouver, B. C., the following night—the following night—well, it would be in the morning, approximately two-thirty in the morning.

Q. Were you able to do any work?

A. No, nothing to amount to anything, only just what I thought had to be done.

Q. How did you feel on the way up?

A. Oh, I had an awful headache and high heart, I wasn't able to do anything, but I was determined to stay on the [33] ship and I just hung on, that is all.

Q. All right, when you got up to Vancouver what did they do?

A. Well, my head got to hurting me and I told the mate about the deal and, well, he told me just to lay around and not work any. He said, "Maybe you will get to feeling better." But finally they decided to send me to a doctor, and I went up to the doctor and he said, "The only thing I can do is send you to a hospital." They sent me up there that afternoon and I stayed that night, if I remember right, and the next day along in the afternoon they taken an X-ray of me or two and put me back in my bunk, and, well, I got tired of staying there,

(Testimony of Benjamin N. Wilhite.)

I wanted to get back to the ship, so while I was out——

Mr. Erskine Wood: I didn't hear that answer.

A. What?

Mr. Erskine Wood: I didn't hear it.

Mr. Tanner: Speak up a little louder.

A. I got tired of lying there in the hospital. There was a fellow that had consumption lying there right close to me and I didn't like it, I thought I would get somewhere else, so I went back to the ship—I dressed and beat it out of there. They didn't know it.

Q. How did you feel? [34]

A. Well, I was pretty dizzy. I had a time getting back to the ship. I finally got hold of a cab and he taken me back, and the next morning—I don't remember whether I stayed on the ship all that day or the next day, but the doctor pulled me off one day or two after that, I don't remember which, but he pulled me off, wouldn't let me go any farther.

Q. The doctor did?

A. That is right. He told me, he said, "You can't go."

Q. Now, if he hadn't told you that you couldn't go would you have gone?

A. Why, sure, I was trying to scheme every way I could to go.

Q. When you left the ship, then, where did you go?

A. Well, they told me to come back to Seattle

(Testimony of Benjamin N. Wilhite.)

or I could come on home. Well, I started to come on home; I got as far as Seattle, I got sick again, so I got me a cab and went to the hotel that night and I stayed there until the next day, I slept late and stayed there until the next day, and got home the next night, two days later.

Q. How were you feeling there in Seattle?

A. Pretty tough.

Q. And then where did you come? Where did you go?

A. I stayed there at Seattle until along about noon, I think, [35] I caught the train and got in home here along about—well, it was along late in the evening some time.

Q. And how was your condition when you got home? A. Well, I went right to bed.

Q. Did you go see a doctor?

A. Yes. I came down to the Union Hall and asked them advice and they sent me up to the Public Health.

Q. That is here in Portland?

A. That is right, in this building.

Q. And you came up to the Public Health then. Do you know about when that was after you got back from Seattle?

A. I think it was the next day or so.

Q. Within a day or two you were up to see the doctor? A. I don't remember the time.

Q. What did you do then?

A. Well, he advised me to lay around and keep quiet. "That is the only way," he says, "it will

(Testimony of Benjamin N. Wilhite.)

do you any good." So that is what I did. I came down a time or two. He had appointments with me and I came down a few times, and he finally sent me up to Dr. Lucas, I think, to have my eyes examined. So I never had said anything to Dr. Lucas, and I asked him about my eyes, told him I had never wore glasses. "Well," he says—he made the remark, asked me if I had had any bumps or anything, and I told him I had. I just wanted [36] to see if he would know before I told him. I told him about it then.

Q. He asked you if you had been hit on your head?

A. Yes, he asked me if I had had any bumps lately, and I told him yes, told him how that happened to be there.

Q. Now, tell us, Mr. Wilhite, how your condition was following that period, over the next several months? How was your condition?

A. Well, it hasn't been very good, and it isn't good yet.

Q. Well, what has been your trouble?

A. Oh, my head is—of a night—and that is something I never do have is a headache, I never did have it. I used to make fun of my daughter about her having a headache, and I never did have the headache, but I have had the headachee pretty near continuously. Once in a while it will let up. If I get out and kind of mosey around for a while it will leave me for a while, but it comes right back on me again.

(Testimony of Benjamin N. Wilhite.)

Q. Did you have any of that kind of pains or that kind of trouble before this accident?

A. No, I never was sick a day in my life.

Q. Your health had always been good, had it?

A. Absolutely.

Q. Are you able to do something now, some work?

A. Well, I can work for a little while but then it comes [37] right back onto me again. I can work for a day or two, but I begin to have that feeling come back onto me.

Q. What feeling is it?

A. Well, it seems like it is just something pulling right on the back of my head here, like it is sliding it down. It is a real deep pain right in the back of my neck, the cord right in there (indicating).

Q. Do you have any abnormal sounds, or anything like that?

A. Yes, a buzzing. My head buzzes quite a lot.

Q. Any other sensations or feelings that you have?

A. No, nothing, only my eyes bothers me.

Q. I mean in your head?

A. No, nothing only a headache, a dull feeling, and buzzing. My head gets to buzzing, it wakes me up in the night.

Q. It interferes with your sleep?

A. Yes.

Q. Now, is it getting any better, or what do you say as to that?

(Testimony of Benjamin N. Wilhite.)

A. Well, I suppose it is getting some better, but it still is a long ways from like I was. I get off of balance quite a lot.

Q. Have you had some trouble with your eyesight? A. Never did.

Q. Before this you never had any? [38]

A. No, sir.

Q. Have you had any since?

A. Well, yes, my eyes, I can notice that I can't read without glasses any more, and before I never did use glasses.

Q. What were you earning at the time of this accident? A. Earning?

Q. Yes.

A. My voyages had been earning me about three-fifty a month.

Q. That was your rate of pay at the time of the injury?

A. Well, it wasn't my rate, but with the overtime and everything it generally amounted up to over three hundred dollars a month.

Q. Well, that is what I mean. Now, do you know how much money you have lost as result of not making that trip or not being able to work at your trade?

Mr. Erskine Wood: I think I will object to that question.

The Court: Sustained.

Mr. Erskine Wood: It will depend on how long——

The Court: Sustained.

(Testimony of Benjamin N. Wilhite.)

Q. (By Mr. Tanner): Do you know how long that vessel was at sea before the crew came back and was paid off?

A. No, I don't. I understood they came back from New Orleans in a few months. They made a trip to Algiers and back to [39] New Orleans and some of the fellows were paid off and some stayed on, but I figured on staying on at least a year, or I had taken enough equipment to stay a year.

Q. I will have a witness here who stayed on that trip. Now, when was it, Mr. Wilhite, that you were table to do some work? You say you are able to do some things now. When was it that you were able to do some work?

A. It must have been four months after that before I done anything.

Q. It was four months before you did anything?

A. That is right.

Q. And then after that four months what work were you able to do?

A. Oh, I went out and would kind of walk around and kind of help some fellow out at building, just kind of superintending. I didn't do any work to amount to anything.

Q. At the present time how much work can you do?

A. Not very much. Two or three days is all at a time. If I didn't get the week ends off, Saturday and Sunday, I wouldn't be able to carry on.

Q. Could you tell us about how much time since you got hurt, altogether, that the time that you

(Testimony of Benjamin N. Wilhite.)

have worked would be? What would you say as to that, as to about how much since this accident you have actually worked? How much time would you [40] say you have put in?

A. I couldn't tell you exactly. I never kept no account of it.

Q. You didn't keep a record as to the——

A. No. It wasn't very much.

Q. Do you find trouble doing part of the work that you formerly did without any trouble?

A. Oh, I couldn't do superintendent's work. I have tried that a time or two.

Q. What part of the work do you have trouble doing?

A. Well, I just can't follow through a blueprint, that is all. I can't remember enough to go ahead with it. I have had several jobs offered me, but I couldn't carry it on.

Q. You say you have had several jobs that you couldn't take? A. That is right.

Q. Let me ask you, have you had any what the seamen call maintenance, or any pay at all, from the steamship company?

A. They paid me for what time I was on there, yes.

Q. How is that?

A. They paid me for what time I was on there, yes.

Q. The time that you were on the ship?

A. Yes, that is right.

Q. But I mean after you left the ship—— [41]

(Testimony of Benjamin N. Wilhite.)

A. Nothing.

Q. ——did you have any what is known as maintenance? A. No, nothing.

Q. They gave you nothing after you left the ship?

A. That is right. I believe that the attorney down there did promise me some money, but he never did send me any so I never went after it.

Mr. Tanner: I would like to have this marked as Libelant's exhibit.

(Abstracts from Medical Record, so produced, was thereupon marked for identification as Libelant's Exhibit 1.)

Mr. Tanner: We offer it, Mr. Wood. It is the Clinical Abstract.

The Court: Is there any objection to the offer?

Mr. Erskine Wood: I think that under a Federal statute this bears a seal and, therefore, is admissible, but it is on the understanding that under the heading "Condition of Patient Upon Admission" the narrative there is merely what the patient told the Public Health.

The Court: Well, the question is, do you or do you not have an objection to the admission of that in evidence?

Mr. Erskine Wood: I have no objection to it.

The Court: Very well, it is received in evidence without [42] objection.

(The said Abstract from Clinical Record, so offered and received, having previously been

(Testimony of Benjamin N. Wilhite.)

marked for identification, was thereupon marked received as Libelant's Exhibit 1.)

The Court: The Court will stand in recess for ten minutes.

(A short recess was thereupon had.)

Q. (Mr. Tanner): Now, Mr. Wilhite, have you been examined herein Portland by a number of physicians? A. Yes, sir.

Q. In addition to the ones that you have mentioned? A. That is right.

Q. At whose request did you submit yourself for an examination?

A. By the insurance company.

Q. Well, by the company, you mean?

A. Yes, by the company. Yes, that is right.

Q. Do you know what doctors the company sent you to?

A. Doctor—Gee, I can't think of the name.

Mr. Erskine Wood: I can supply the name, if you want me to.

Mr. Tanner: Well, Dr. Raaf? [43]

A. Dr. Raaf, that is right.

Q. Now, Mr. Wilhite, let me ask you this question: At any time before you were hurt did you get any notice or any warning that this timber had been lowered? A. No, sir.

Mr. Tanner: I think you may inquire.

(Testimony of Benjamin N. Wilhite.)

Cross Examination

By Mr. Erskine Wood:

Q. Mr. Wilhite, I will take up first your testimony about your earnings. You said you earned three hundred and fifty a month, and then you later cut that down to about three hundred a month, but your rate of pay on the ship was $157.50 as carpenter, was it not, plus $7.50 for the rent of your tools? A. Ten dollars, I think.

Q. I happen to have looked up the Articles. Isn't it $165, your total take for the month?

A. Well, there is a lot of overtime, see.

Q. Yes.

A. I was basing that on the monthly earnings on the other ships. That is about what they paid, between three and three-fifty.

Q. Yes, but on the other ships, you were working on them earlier and in the war period when they were paying more overtime [44] and more bonuses, isn't that true?

A. Well, no, not on the second ship I didn't get any bonus.

Q. But you have no record of your overtime, have you? A. No—I do at home, yes.

Q. Are you going home at noon? Could you produce that, that record of your overtime?

A. I have—I don't know whether—I have got my seaman's book here. I don't know. Maybe my pay is here. I think the first trip I made to Aus-

(Testimony of Benjamin N. Wilhite.)

tralia was seven months—I think that paid about $700 a month.

Q. That was in 1942, though?

A. That is right.

Q. When the war was on they paid big bonuses for——

A. Then the one I made to Manila, I think that was pretty close to three-fifty.

Q. Well, what year was that in?

A. That was in October, September—let's see, August, September and October, or September, October and November.

Q. Of what year? A. '45.

Q. '45. That voyage began in August, '45?

A. What?

Q. Let's see—that voyage began in August, '45?

A. Sometime in there. I don't remember just exactly. [45]

Q. So the war was still on then, wasn't it?

A. '46 I am thinking about. '46 it was, in place of '45.

Q. Well, you have no record of any overtime on this ship, have you?

A. I don't think there was much overtime. I hadn't been on very long. You generally get your overtime after you get out to sea.

Mr. Tanner: I didn't get that last answer. When do you get the overtime?

A. Mostly at sea.

Mr. Tanner: At sea? A. Yes.

Mr. Erskine Wood: I would like to go back to

(Testimony of Benjamin N. Wilhite.)

the beginning of your testimony. Did you say you have been a carpenter for forty years?

A. Yes, sir, off and on.

Q. And what other occupations have you followed?

A. Oh, I have followed farming and superintending and construction work.

Q. You have been in the real estate work, too, haven't you?

A. I had a few houses that I got in the Hoover Administration that I had to get rid of, so I tried to sell for myself.

Q. How long were you in the real estate business?

A. I think I carried a license a few years. [46]

Q. How long were you farming?

A. Well, I never kept any particular time. I would farm and then I would retire from farming and go to building.

Q. Where did you farm?

A. I had a farm in Missouri; I had a farm down in Toledo County (sic) in this state; I had a farm in Minnesota.

Q. Did you farm a good many years?

A. I had a farm, but I did a lot of carpenter work outside of farming.

Q. How long have you lived in Portland?

A. Off and on, since '16, 1916.

Q. Do you have any intention of trying to go to sea again?

A. I would like to go if I could——

(Testimony of Benjamin N. Wilhite.)

Q. How?

A. I would like to go if I could get so that I could, yes. I love to travel.

Q. You would prefer that to being a carpenter on shore, would you? A. Yes.

Q. To get a job, though, you would have to maintain your Union membership. I would like to ask you if you have done that? A. No.

Q. I draw the inference, then, am I right, that you have [47] no intention of going back to sea?

A. Yes, as quick as I get dismissed from this, from the doctor, why, I will go back.

Q. Now, how long had you been on this particular vessel before you were hurt?

A. I went to work the 3rd of January and they paid me off the 29th.

Q. You now say that you were hurt on the 20th, do you? A. That is right.

Q. So you had been on the vessel plenty of time to familiarize yourself with it, hadn't you?

A. Well, it was laying in dock here and we merely reported in the morning and were dismissed.

Q. Do you mean to say you didn't do any work on it during——

A. Well, nothing unless it was just some little something that the mate would ask us to do and then we were dismissed.

Q. You were thoroughly familiar with the lay-out and the situation back there at the stern, were you not?

A. Oh, yes; the Liberty ships, I knew them.

(Testimony of Benjamin N. Wilhite.)

Q. What?

A. I knew the Liberty ships, yes.

Q. And you were doing some kind of work back there this day, but you don't remember just what it was?

A. We were getting ready to go to sea, you see, and we were [48] supposed to sail that morning, but we didn't sail until late that afternoon.

Q. Do you know how long you had been working back there at the fantail?

A. No, I don't know.

Q. Approximately?

A. Well, I wouldn't know. I don't remember.

Q. Well, I mean, had you been there a couple of hours, or fifteen minutes?

A. No, I don't think so, because things was kind of all in a muss there. The boatswain was getting off; he was trying to get loose from the ship.

Q. Give us your best estimate of about how long you had been back there?

A. Not very long. I would say just a few minutes.

Q. Now, you saw these sailors painting the life rings there, did you?

A. I don't believe they were painting during that time. They might have been.

Q. What were they doing? Hanging them up?

A. They were already hung up.

Q. You saw that?

A. Yes, I remember seeing the life rings up.

Q. And when you got this order to go forward

(Testimony of Benjamin N. Wilhite.)

to the anchor, [49] just tell us again how you walked or what you did. You said you didn't run. You walked, didn't you?

A. Well, I always walked at a good, stiff walk. I never was slow at walking.

Q. And did you look where you were going?

A. I was looking down, because there was something laying on the deck I had to step over.

Q. What was it?

A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea.

Q. Well, now, what was it? Was it litter, or was it a pipe, or what was it?

A. Well, I don't remember. I couldn't say. I just don't remember what it was.

Q. And how many steps had you taken before you hit your head? Approximately, I mean?

A. Oh, three or four, something like that.

Q. And did you stoop to go under this thing?

A. No. I generally walk pretty straight, but you wore a seaman's cap, you know—I always wore a seaman's cap.

Q. You didn't stoop to go under it?

A. No; I never walk with a stoop. [50]

Q. I didn't mean habitually. I mean you didn't duck your head to go under it? A. No.

Q. You saw the life rings hanging there?

(Testimony of Benjamin N. Wilhite.)

A. Yes, sir, that is right. There was a space between the life rings. They left it there.

Q. What do you suppose they were hanging from?

A. I don't know that I noticed. In fact, when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping.

Q. As you approached the fog buoy and the life rings you took your hands to part the rings, didn't you, so you wouldn't get paint on you, didn't you?

A. No; there was a space, I would say, about that wide, a passageway through.

Q. You didn't do anything to the life rings to keep from getting paint on you? A. No.

Q. And you didn't duck your head?

A. No.

Q. And you walked straight forward?

A. Well, I generally do. I don't just remember what position——

Q. And you didn't stoop? [51]

A. No.

Q. Well, how did you hit the back of your head?

A. Just the top of it, like that (indicating). You see, the bottom was lashed down on the forward end of it. The forward end of it was laying on a vent that comes from a toilet on the stern of the ship. That is where the soldiers or the Navy crew stay, and that was laying on top of that. One end was lower, you see, than the other.

Q. One end was what?

(Testimony of Benjamin N. Wilhite.)

A. One end was lower. It was kind of on a slope, you see.

Q. You mean the forward end was lower?

A. That is right.

Q. And is that the end you hit on?

A. That is right.

Q. How tall are you?

A. I am five feet eleven and a half inches.

Q. Five feet eleven and a half inches; so, without stooping, and walking erect, you just barely hit the top of your head, is that it?

A. Well, it hit me enough to stagger me quite a bit.

Mr. Erskine Wood: Well, that isn't an answer. I move to strike that answer.

Mr. Tanner: I resist that motion.

The Court: The motion is denied. [52]

Q. (Mr. Erskine Wood): I say, it is a fact, is it not, that, without stooping, and walking erect, you hit yourself on the top of your head; is that right?

A. Yes, I caught it on the back of my head. You see, I was looking, I kind of turned, down to this to step over it. I don't remember what was there. The deck was strewed with all kinds of stuff anyway.

Q. Such as what? Rope, or——

A. Oh, lines and, oh, different kinds of stuff that they use on the ship.

Q. Different kinds of stuff that you see in use on a ship—is that what you said?

(Testimony of Benjamin N. Wilhite.)

A. Well, there's no line back there. The lines were stowed forward, more forward than this.

Q. How long had these sailors been there painting these rings or getting ready to paint them?

A. I don't know. I didn't have nothing to do with them.

Q. Had they been there all the time that you were there? A. I couldn't say to that.

Q. How did you know that this was slanting a little bit downward, forward?

A. I went back and looked at it after I got hurt.

Q. How long after?

A. Oh, I would say half an hour, something like that; after [53] I got relieved from the anchor——

Q. You went back then and looked at it?

A. Looked it over, yes. I mentioned it to the boatswain.

Q. When you bumped your head did you break the skin on your scalp?

A. No, sir, it was a funny thing, it didn't, but my skin was awful sore. I couldn't stand to use a towel on my head.

Q. But you didn't draw blood?

A. No, I didn't break the skin on my head. I hit it more flatways.

Q. And you didn't fall down, did you?

A. No. It got me down pretty well, though.

Q. You were not knocked unconscious?

A. No, I wasn't unconscious.

Q. And you didn't fall to the deck?

(Testimony of Benjamin N. Wilhite.)

A. No.

Q. What time of day do you claim this happened? A. It was in the forenoon.

Q. In the forenoon; can you approximate the hour?

A. Oh, I wouldn't say just what time it was. There was a big rush around there. I never paid any attention to the time. Sometime after coffee time.

Q. I believe you said the boys laughed about your accident? A. They did. [54]

Q. What boys were those?

A. Oh, some of the seamen. You see, they were all new; everybody was new at that time.

Q. You mean some of the fellows that saw it happen?

A. Oh, yes, they laughed. They always do laugh at such things as that.

Q. Did the boatswain laugh about it?

A. Oh, yes.

Q. When you went back and examined this fog buoy after you had done your work forward how much did you find it had been lowered?

A. Well, if I had been walking perfectly straight it would just about hit me at the forehead, just about there (indicating).

Q. Well, how much does that mean it had been lowered?

A. Oh, I never measured how far it was down, but it was more than—there was two of them hanging there, see.

(Testimony of Benjamin N. Wilhite.)

Q. But one of them was down?

A. Only one. They had lowered one end to tie their life rings on it.

Q. Had they tied their life rings to the lowered end? A. That is right, there alone.

Q. Well, now, Mr. Wilhite, you have said that the forward end was the lowered end. [55]

A. That is right.

Q. And you also testified that there was a free passageway there of four feet or so without any life rings on it.

A. There was a passageway. I wouldn't say it was four feet. I would say just about that much; just enough for a fellow to get through. There was life rings hanging on both ends, both sides of it.

Q. Well, then, was that four-feet passageway next to the deckhouse?

A. No, I mean about four feet—about three feet, three and a half to three feet, between the life rings, just enough for a man to get through.

Q. That is what you found when you went back? A. No I went through.

Q. That much you did observe there?

A. Oh, yes.

Q. In other words, as you approached this thing, before you got hit, you saw a space three or four feet wide between the life rings, which you attempted to go through?

A. I will say thirty inches.

Q. I say, you saw that before you got hit?

(Testimony of Benjamin N. Wilhite.)

A. Yes; I was looking for a place to get through.

Q. Did you see the fog buoy at that time before you got hit? [56] A. No, I never.

Q. What?

A. No. I presumed it was up. They generally keep things up and out of the way.

Q. Well, if you didn't see it what did you think these life rings were hanging from?

A. I never paid any attention to what they were hanging from. I was in a hurry.

Q. When you got to Vancouver you complained of a headache and you went to the Catholic Hospital, the St. Paul's Hospital, didn't you?

A. Yes.

Q. Was the doctor there, Dr. Fred Hogan?

A. I don't know what his name was. I didn't go right direct to the hospital; I went to his office in the Custom—they sent me to the Custom House. That is where his office was.

Q. And from there you went to the hospital?

A. He sent me to the hospital. I went back to the ship and got to the hospital about night.

Q. You got to the hospital the same day you left the ship? A. Yes.

Q. And that was the 24th of January, was it?

A. I don't remember the date.

Q. Did you stay in the hospital that night? [57]

A. I did.

Q. And you left the hospital the next morning?

A. No.

Q. When? A. Late that next night.

(Testimony of Benjamin N. Wilhite.)

Q. Late the next day?

A. That is right.

Q. Because you didn't like the conditions there?

A. That is right.

Q. How is that? A. That is right.

Q. And you never returned to the hospital, is that right? A. No.

Q. You were not discharged from the hospital; you left yourself?

A. I left myself. They only wanted to take an X-ray and they was done with me, as far as that was concerned.

Q. How do you know what other examination they may have wanted to make?

A. Well, he told me that he was going to send me back to Seattle, the doctor did.

Q. But you were not discharged from the hospital; you walked out; isn't that a fact?

A. That is right. [58]

Q. Well, then did you go back to the ship?

A. Yes, I taken a cab and went back to the ship.

Q. And how long did you stay on the ship?

A. I don't remember that either.

Q. I don't mean hours; I mean days.

A. I think I stayed there the next day and the Seaman's Local Business Agent was down there looking for me, and I can't just exactly figure it out, but—I know as I can tell you just exactly the——

Q. What do you mean by saying you were

(Testimony of Benjamin N. Wilhite.)

pulled off the ship? Who pulled you off? The Business Agent? A. The doctor.

Q. Which doctor?

A. This doctor. I don't know just what his name was.

Q. The same one you had gone to first?

A. Yes.

Q. And what did the Business Agent have to do with it?

A. Well, I don't know where he came in at it. I couldn't say. I guess he got it from the doctor, or something.

Q. Well, do you know whether it is a fact or not that the Business Agent of the Union was anxious to take you off the ship to create a vacancy for another man?

A. No, I don't think so.

Q. You have no reason to suspect that? [59]

A. Well, the doctor was the first that pulled me off, see. He wrote a slip of paper and told me to give to the captain, and that was the time that the captain told me that I had to go to the hospital in Seattle.

Q. And you don't know what doctor that was?

A. It was the doctor at the Custom House. I think it was the same doctor I went to the first time.

Q. Did you go to more than one doctor?

A. No; there was two in the office and they both talked about it there.

(Testimony of Benjamin N. Wilhite.)

Q. And you don't know the names of the doctors? A. No, I don't.

Q. If I said Dr. Fred Hogan, that wouldn't refresh your memory?

A. It wouldn't make any difference to me, if you named him; I wouldn't know one from the other.

Q. You were paid in full up to the time you left the ship, weren't you?

A. That is what the Consul demanded.

Q. Were you paid off before the American Consul? A. That is right.

Q. You signed off by mutual consent, did you?

A. Well, that is the way they made it, but I didn't make any objection. Of course, I couldn't, because the captain [60] dismissed me after the doctor pulled me off the boat.

Q. Mr. Wilhite, did you, before the American Consul, sign off the articles by mutual consent?

Mr. Tanner: Now, I object to that. He can state the facts, but that is a conclusion as to what is mutuality.

Mr. Erskine Wood: Well, I don't think——

The Court: Well, I don't think so. I think it is obvious the man was given medical attention and was paid off and left the ship. He wasn't forced off the ship. There is nothing about any force about it. Apparently his testimony is true, he left the ship because he was injured—he probably didn't desire to be ill—and that was the reason he didn't

(Testimony of Benjamin N. Wilhite.)

make the voyage. Overruled. I think it is a matter of detail.

Mr. Erskine Wood: Will you read the question to him.

(Pending question read.)

A. Well, I suppose you would call it that, yes.

The Court: Well, what objection, if any, did you make to signing off the articles at that time?

A. Well, I didn't want to sign off.

The Court: Well, what objections did you voice?

A. Well, I don't understand you.

The Court: What did you say about not signing off in the American Consul's office? [61]

A. I told him the circumstances and showed him what the—told him what the doctor told me, and I said, "I guess that is the only thing I can do, I guess." He said, "You can go to Seattle, that is all."

The Court: The American Consul told you that is the only thing you could do?

A. That is right.

The Court: You were not in physical shape to make the voyage and do your work, were you?

A. I wasn't in physical shape to do it.

The Court: Proceed.

Q. (Mr. Erskine Wood): Just a moment. Mr. Wilhite, last June you gave some testimony about your accident, didn't you?

A. Yes, sometime last summer.

Q. And didn't you then testify that as you approached this passageway you used your hands to

(Testimony of Benjamin N. Wilhite.)

part the life rings because you wanted to get through there without getting paint on you?

A. Well, there was room left there, but I might have put my hand up to part them a little, but there was that much room between the life rings.

Q. Well, you did testify that way, didn't you?

A. I might have, yes. I don't remember.

Mr. Erskine Wood: That is all. [62]

Mr. Tanner: That is all, Mr. Wilhite.

(Witness excused.)

The Court: Call your next witness.

KONSTANTINE GEORGE

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name.

Mr. George: Konstantine George.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Konstantine George?

A. Yes, sir.

Q. And what is your occupation?

A. Well, right now I am preparing to go to school, to college. At one time my occupation was a seaman. Previous to that I was a student.

(Testimony of Konstantine George.)

Q. All right, when did you first start to go to sea? When did you first have seafaring experience?

A. Well, I joined the maritime on September 23, 1944. [63]

Q. In September, 1944? A. Yes.

Q. Now, in what capacity did you first obtain employment?

A. I first obtained employment as a radio operator on board a ship.

Q. And did you have occasion to go aboard the Franklin K. Lane?

A. I did go aboard the Franklin K. Lane. I made arrangements with the Coast Guard and the Union and a friend so we could sail together,—since the war was over, we were in the capacity of ordinary seamen—so in doing so we could be on the same ship and make one trip together.

Q. Were you aboard the Franklin K. Lane with Mr. Wilhite? A. Yes.

Q. Did you get acquainted with him?

A. Yes, I did.

Q. Mr. George, what was his condition, so far as you observed and within your knowledge, from the time the Franklin K. Lane left Portland until it got up to Vancouver, British Columbia?

A. Well, I will say that I didn't see much of him up to there, but what I did see of him—I didn't see him do any work aboard the ship, and—well, before that, I don't know, he used to have a certain little shuffle. We used to always talk in the mess hall together, and I would just talk back [64] and

(Testimony of Konstantine George.)

forth, just joking back and forth, nothing serious, nothing meaning any business, just passing the time of day,—and he seemed a little bit different—well, to tell you the truth, I couldn't say why, but I did know that he had hit his head,—I didn't see it or anything—and, the only thing, he mentioned pains, he mentioned it to the mate and the crew, and he had been laying up in his forecastle.

Q. You mean he had been disabled during that trip, is that correct? A. Yes.

Q. Now, you continued on the trip, did you not?

A. Yes, I did.

Q. State whether or not that boat—how that trip was as to the question of overtime? Was it a good overtime ship or poor overtime ship? What do you say as to that?

Mr. Erskine Wood: I object to that, your Honor. That is too vague, your Honor.

Mr. Tanner: Oh, I think not, your Honor. They have ships that have overtime and some that don't, depending on the master.

The Court: Oh, I think I will sustain the objection.

Q. (By Mr. Tanner): I will ask you to state whether or not during the course of that trip you saw the carpenter working [65] overtime, the ship's carpenter working overtime, during that trip?

A. Yes, he did. He worked quite a bit of overtime, in fact, owing that that ship was a pretty good ship for overtime as far as the crew was concerned.

(Testimony of Konstantine George.)

We done a lot of work, because the ship was converted——

The Court: Now, just a minute. You have answered the question. The portion of the answer that the ship was a good ship for overtime as far as the crew was concerned is ordered stricken as being not responsive and a voluntary statement of the witness.

Mr. Tanner: I think you may cross-examine.

Mr. Erskine Wood: That is all.

(Witness excused.) [66]

CHRISTINE WILHITE

was thereupon produced as a witness in behalf of the libelant herein and was examined and testified as follows:

The Clerk: Your name, please?

Mrs. Wilhite: Mrs. Wilhite.

The Clerk: What is your first name?

Mrs. Wilhite: Christine.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Mr. Tanner: May it please the Court, could I ask at this time for a stipulation of counsel as to when the ship paid off back in Portland? How long the trip lasted? I neglected to ask the prior witness. I can ask him where he sits. If counsel knows it.

Mr. Erskine Wood: I don't know it myself.

(Testimony of Christine Wilhite.)

Mr. Tanner: Could I have leave to ask the witness George as to when the ship came back?

The Court: You can finish with the witness on the stand and recall the witness.

Mr. Tanner: Thank you, your Honor.

Q. You are Mrs. Wilhite, are you not?

A. Yes, sir.

Q. And how long have you been married to Mr. Wilhite?

A. Oh, I will say forty-two years. 1904 is when we were [67] married.

Q. All right.

A. So you will have to figure that out. I forget.

Q. I just want to ask you two or three questions. How was his health before he got hurt on the Franklin K. Lane, Mrs. Wilhite?

A. He was just fine.

Q. Now, when did you see him, Mrs. Wilhite, after he—when was it that you first saw him after this injury? A. It was when he came home.

Q. And about when was that? Do you recall the date?

A. Well, I really can't remember the day, I really can't, but anyhow——

Q. What was his condition when you did see him, when he came home?

A. Well, he certainly—almost fell to the floor.

Q. Well, just go ahead and tell us why.

A. His eyes was red and his head was red. He was in an awful condition physically.

Q. What did you do for him?

(Testimony of Christine Wilhite.)

A. Well, he just went to bed.

Q. Now, how has he been since, Mrs. Wilhite?

A. Well, not extra. Pretty good, but not to say too good.

Q. What have you noticed about him that is different than [68] he was before this accident?

A. Well, he seems to have such awful headaches, and he is unreasonable, and he is quite different; never saw him that way before.

Mr. Tanner: Cross-examine.

Cross-Examination

By Mr. Erskine Wood:

Q. Mrs. Wilhite, how old is your husband?

A. He is sixty-two.

Q. Was he married when he was twenty?

A. Married when he was just twenty.

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you, Mrs. Wilhite.

(Witness excused.) [69]

REVA HOBKIRK

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: What is your name?

Reva Hobkirk: Reva Hobkirk.

(The witness was then duly sworn.)

(Testimony of Reva Hobkirk.)

Direct Examination

By Mr. Tanner:

Q. Mrs. Hobkirk, is it? A. That is right.

Q. Hobkirk? A. That is right.

Q. And you are the daughter of Mr. Wilhite, are you not? A. I am.

Q. Mrs. Hobkirk, when did you see him after—how long was it after he was hurt that you saw him, do you recall?

A. The night that he arrived home.

Q. You were home when he got back, were you?

A. No, I wasn't. I happen to live next door, so when he came home the little granddaughter ran over and she said, "Grandpa is home," and that is the first that I seen him.

Q. Just eliminate conversations about this. You found out from the granddaughter that your father was home? A. That is right. [70]

Q. Now, you went over there, did you?

A. I did.

Q. Did you observe anything unusual about his condition? A. Definitely.

Q. And what did you observe?

A. Well, he was just sort of dense, and he didn't much to say and he retired immediately after he saw the family.

Q. And did you see him frequenly?

A. Yes, I did. Of course, we were very concerned, because we knew—we hadn't known that he

(Testimony of Reva Hobkirk.)

had had an accident. Until he arrived home we didn't know it.

Q. Now, what change have you noticed, and over what period of time, about your father, different than the way he was before he took that trip?

A. Well, Dad was always very constructive, being a carpenter, and he was always doing things in the home, and I can't say that he has done anything since then, due to suffering from headaches. And he was a great reader, but now all he does is look at pictures in Life magazine, and that sort of thing, and he retires to the davenport on all occasions while he is in the house.

Q. And have you noticed any difference in his faculties, his memory, and things like that, when you have conversed with him? [71]

A. Well, yes, he is different, entirely different.

Q. In what way, Mrs. Hobkirk?

A. Well, his conversation is just different and, oh, perhaps I should say childish. He don't have the business manner he used to have.

Mr. Tanner: I think you may inquire.

Mr. Erskine Wood: No cross examination.

(Witness excused.)

Mr. Tanner: Just this one witness, your Honor, and that will be our case. We will have one question. [72]

KONSTANTINE GEORGE

was thereupon recalled as a witness in behalf of the Libelant herein and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Tanner:

Q. Could you tell us, Mr. George, when the Franklin K. Lane returned to Portland and you were paid off?

A. Well, we never did return to Portland. We were paid off in New Orleans—I can't tell you the exact date, but as quick as I signed free on the ship, but it was approximately the middle of April.

Q. The middle of April of 1946?

A. Correct.

Q. What was the length of that voyage, can you recall?

A. Well, I signed on articles on January 3rd. From January 3rd until about the middle of April. I don't remember the exact length of time.

Mr. Tanner: All right, that is all.

(Witness excused.)

Mr. Tanner: That is the Libelant's case, your Honor.

The Court: Very well, the court will stand in recess until 2:00 o'clock this afternoon. [73]

(Whereupon, at 12:00 o'clock noon, January 16th, 1947, a recess was had until 2:00 o'clock P.M.) [74]

Afternoon Session, 2:00 p.m.

Mr. Tanner: Your Honor, I'd like to have the record reflect at this time what the regulation—I understand of it—of the War Shipping Administration with reference to the amount that is allowed for maintenance and cure is. It is a flexible amount depending on the cost of living, and Counsel has consented that we can put into the record that they are allowing $3.50 a day for their maintenance.

Mr. Erskine Wood: That is without any admission this man is entitled to it.

Mr. Tanner: I understand that, but that is the amount being allowed. That is left to the Court to determine what is reasonable for a man's food and keep.

The Court: Very well. Let the record show that it is agreed between counsel that the rate allowed generally for maintenance and cure is $3.50 a day. Proceed, Gentlemen.

Mr. Erskine Wood: Call Dr. Raaf.

DR. JOHN RAAF

was thereupon produced as a witness in behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Erskine Wood:

Q. Dr. Raaf, you are a practicing physician here in Portland, [75] are you, physician and surgeon? A. That is correct.

(Testimony of Dr. John Raaf.)

Q. Will you please state your qualifications?

A. I went to Stanford University Medical School, finished my senior year at Stanford University in 1929, and I had an internship at Rochester Municipal and Strawn Memorial Hospitals in Rochester, New York. I stayed there a second year and then I went to the Mayo Clinic in Rochester, Minnesota, and I was there five years in neurology and neurosurgery and general surgery. I have practiced in Portland since 1936.

Q. What medical society do you belong to?

A. I belong to the Multnomah County Medical society, the Oregon State Medical Society, the American Medical Association, American Association for Surgery of Trauma, the Harvey Cushing Society, the American Acedemy of Neurosurgery, and possibly some others I don't remember.

Q. Do you lecture in any subjects in the University of Oregon Medical School?

A. I have charge of the Department of Neurosurgery and I lecture in neurosurgery at the University of Oregon Medical School.

Q. What specialization do you make of injuries to the brain or head?

A. My practice is confined to neurological diagnosis and [76] surgery, that is diagnosis and surgery of diseases and injuries of the nervous system.

Q. That necessarily includes injuries?

A. That includes the brain and spinal cord and nerves throughout the body.

(Testimony of Dr. John Raaf.)

Q. Did you make an examination of Mr. Wilhite on behalf of respondent in this case?

A. I did, sir.

Q. When was it?

A. He was first seen in my office on February the 20th, 1946.

Q. And did you see him more than once?

A. I did.

Q. When else did you see him?

A. He was seen again on April 29, 1946.

Q. Is that the last time you saw him?

A. No. He was seen again on the 26th of July, 1946, and I believe that is the last time I saw him.

Q. And did you examine him particularly for an alleged injury to his head resulting in headaches and so forth? A. I did.

Q. Did you find any objective symptoms at all?

A. I did not.

Q. What subjective symptoms did he complain to you about? [77]

A. He was complaining of headaches, double vision, ringing in his ears, and numbness of the right arm at night.

Q. None of those are objectives things, are they?

A. They are not.

Q. What did he tell you had happened to him at the time of this accident?

A. He stated that on January the 23rd, 1946, he was on a boat, raised up suddenly and hit his head on a 6 by 6 timber, fell to his knees, felt stunned, but was not unconscious. Although he had

(Testimony of Dr. John Raaf.)

a headache he continued to work. The next day his headache persisted and he felt as if he could not walk straight. He went to Vancouver, British Columbia, was paid off the ship on the advise of a physician. His headache persisted and was so severe he stopped en route to Portland because any jarring aggravated his condition.

He noted some variable double vision during, or since the injury, which is not constant but is present every day, but he said it would come and go during the day. He has not been able to drive his car since the injury because of the double vision, the headache, and a little dizziness. His headache is less severe, but that the double vision is as marked as ever. He has continuous ringing in the ear since the accident. He has never been unconscious since the accident. He awakens at night with his head throbbing. His eyes bother [78] him some and his vision is blurred when he reads. Since the accident the arm feels numb at night, but this does not occur in the daytime.

Q. Now, the evidence in this case today is that this man struck the top of his head on a wooden beam, that he was not running, walking at the time, was wearing a cap, that he didn't cut his scalp, there is no evidence that his head was bruised, that he was not knocked down, although he was staggered, he was not unconscious, he and his mates laughed about it, but he went on about his work, although he had a headache, and he found it somewhat difficult to work and lay on his bunk because of headache, and

(Testimony of Dr. John Raaf.)

he says that those conditions practically continue to the present time, that is to say, headache and occasional dizziness, once in a while loss of balance, feeling of loss of balance, but particularly the headache is what he complains of. I'd like to ask whether since these symptoms still persist a year after the accident what is your opinion as to whether they probably are or are not a result of the accident?

Mr. Tanner: I object to that, your Honor. He has asked the Doctor to assume a state in the record that is not in accordance with my recollection of the testimony. My recollection, your Honor, is that there was a soreness at the top of the head immediately after, so sore he couldn't touch it. [79] Now, if that is what he means by bruising, I don't know, but I think that ought to be included in any hypothetical question that is given to the Doctor.

The Court: Yes, I agree with that, that there was a soreness of the head, and he also testified, as I recollect, when his head came in contact with the timber that he felt dazed, and while he was doing his work thereafter he felt dizzy.

Mr. Wood: I would like those factors to be supplemented and included in my question, and I will strike out what I said about the men laughing about it. Perhaps that is inaccurate.

A. Well, it seems to me that if one year later these symptoms have persisted in their same intensity as they were at first that they are not due to the injury. The injury seemed relatively minor, and

(Testimony of Dr. John Raaf.)

it seems logical to assume that the symptoms from the head injury would have subsided long ago.

Q. (By Mr. Erskine Wood): The man claims that his vision was impaired by this blow. I'd like you to state your opinion whether that is possible or not.

A. Well, I don't believe his vision could have been impaired by that minor a blow without any skull fracture and without any evidence of a tearing of the brain or bruising of the brain. [80]

Q. What other possible causes could be of these headaches and dizziness and things he complains of?

A. I assume you mean the headaches and dizziness that he now complains of at the present time?

Q. Yes.

A. Well, of course, they could be due to things like high blood pressure or anxiety or constipation or any sort of illness; any number of illnesses can cause headaches.

Q. You mentioned high blood pressure. Did you in your examination of him find out anything about his blood pressure?

A. His blood pressure at the time I saw him was 174 over 110, which is an elevated blood pressure.

Q. Would that be a possible cause of these symptoms? A. Could be.

Q. That would be an objective finding in your examination, would it not, not subjective?

A. High blood pressure, yes. Yes, the high blood pressure is an objective finding.

Mr. Erskine Wood: I think that is all.

(Testimony of Dr. John Raaf.)

Cross-Examination

By Mr. Tanner:

Q. Would your answer be any different, Doctor, if the symptoms had, and the complaints had become less following [81] the accident, had diminished somewhat?

Mr. Erskine Wood: In what degree?

Q. (By Mr. Tanner): I don't want to mislead you, Doctor. I noticed you prefaced your answer, "If they persist in the same intensity." Do you place any particular significance on that part of your answer?

A. I would think that the headaches and dizziness and ringing in the ears and the numbness of his arm, which he complained of at the time I saw him, which was approximately a month after the blow on the head, would have subsided completely within a year, had it been due to the blow on the head. In other words, we know that a blow on the head can produce the symptoms which he stated, but a blow of minor degree such as his apparently was, which did not fracture his skull, I would think would have gone away by this time.

Q. Well, now, Doctor, isn't it a fact that there is no regeneration of brain cells?

A. Yes, that is correct.

Q. So that any injury that would be due to a destruction of any particular brain cell, you wouldn't expect that brain cell to ever regenerate, would you, Doctor? A. No, I wouldn't.

(Testimony of Dr. John Raaf.)

Q. Now, you said something about this blood pressure being elevated. Now, Doctor, would you say that that is anything [82] particularly abnormal, considering a man of his age?

A. Yes, his blood pressure was higher than it should be for a man of his age.

Q. Well, it is above normal, but it is within the range of what you would find, isn't it, among——

A. Not among normal individuals. Of course, we find high blood pressure, that is true, but his is higher than it should be for his age.

Q. That is something that changes very often—it might have been less at other times? Isn't there a variation, Doctor, as much as 20 points that you find between examinations?

A. Yes, that is a possibility.

Q. And if you would reduce this 20 points on the systolic it wouldn't be out of line, would it?

A. No, I would say if his blood pressure were 154 instead of 174 it possibly would be on the upper limits of normal for a man of that age.

Q. Now, don't you find, Doctor, that this blood pressure frequently is affected by anxiety and things of that kind over one's condition?

A. Blood pressure will change with anxiety or emotion.

Q. And you found him rather concerned about his condition, didn't you, Doctor? [83]

A. Well, I don't recall that I did. Naturally he was concerned about what was causing his symptoms, but I don't remember that he was extremely

(Testimony of Dr. John Raaf.)

upset about it or that he was, you might say, jittery or nervous.

Q. Well, you have no reason to question the history that he gave you of this, have you, Doctor, his concern over it? A. No, that is right.

Mr. Tanner: I think that is all.

Redirect Examination

By Mr. Erskine Wood:

Q. I forgot to ask you one thing. This man testified he was struck on the upper, on the back part of the upper part of his skull. About here he put his hand (illustrating). I want to ask you whether that is of the more vulnerable portions of the skull, or otherwise?

A. It is one of the less vulnerable portions, you might say. In other words, it does not overlie the most vulnerable parts of the brain.

Mr. Erskine Wood: That is all.

Recross-Examination

By Mr. Tanner:

Q. Well, now, look, Doctor, isn't it a fact that the injury to the brain cells frequently occurs in places other than where the impact occurred? [84]

A. That is correct.

Q. So that it isn't significant at all where, so far as injury to the brain cells are concerned, where it occurred. It is in a liquid form, is it not, the brain, so that the force might be applied elsewhere, isn't that so, Doctor?

(Testimony of Dr. John Raaf.)

A. Yes, that is true. Of course, we have no evidence here that he ever had injury to the brain cells.

Q. Well, you have some evidence; his history would indicate that he was, that is, that he had had an injury to his, to the nervous system, wouldn't it?

A. He received a blow on the head, that is true, but from the evidence that we have, that is from our examination, from the X-rays of the skull, from the electroencephalogram, which is a test of brain activity by an electrical means, and there is no evidence that there was damage to the brain cells.

Q. Now, what you are saying now is that you couldn't elicit any objective symptoms of it?

A. That is right.

Q. But you wouldn't be prepared to say under oath that there wasn't, would you, Doctor?

A. No, I would not. The injury might have been so minute that we couldn't detect it by clinical means or by, of course, the X-ray of the skull.

Q. Well, the symptoms which he described are typical of [85] concussion, are they not, Doctor?

A. Of course, we get into an argument as to what concussion is, but the one symptom of concussion is unconsciousness, and he had no unconsciousness, as I understand it, following the blow on the head.

Q. Well, that is just one symptom, isn't it?

A. Well, that is the symptom that most people use to diagnose concussion, that is, a known blow on the head followed by unconsciousness.

(Testimony of Dr. John Raaf.)

Q. Let's talk about injury to the neurological system, then, if you don't like that term. He had dizziness. Now, that is a symptom of an injury?

A. That is a symptom of injury to the brain, yes.

Q. And he had what was known as, was dazed. That would be an injury or a symptom of injury, wouldn't it? A. That is right.

Q. Now, don't you say that that is part of a concussion symptom, aren't they?

A. There again we get into an argument as to what technically concussion is. My definition of concussion is that a patient has to be rendered unconscious in order to make the diagnosis of concussion. Now, of course, you can have an injury to the brain such as a tearing of the brain without—and massive injury to the brain—in other words, without concussion. [86] Of course, this is technical, but for a doctor a concussion means a period of unconsciousness.

Q. All right. But, then, you can have some very severe injuries to the central nervous system without that, can't you? A. Without that——

Q. Without being rendered unconscious?

A. That is right.

Mr. Tanner: I think that is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Erskine Wood: Call Mr. Nyborg. [87]

ROBERT N. NYBORG

was thereupon produced as a witness in behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. Mr. Nyborg, you are a resident of Portland, I believe? A. Yes, sir.

Q. Speak a little louder, will you?

A. Yes, sir.

Q. And what is your occupation?

A. Naval architect.

Q. And what company are you employed by?

A. Oregon Shipbuilding Corporation.

Q. That is one of the Kaiser shipbuilding companies, is it not? A. Yes, sir.

Q. Kaiser-managed? A. Yes, sir.

Q. That company built a great many Liberty ships during the war, did it not?

A. Yes, sir.

Q. Were you a Naval architect for the company during that period? A. Yes, sir. [88]

Q. Are you familiar with the construction of Liberty ships? A. Yes, sir.

Q. You hold the plans of Liberty ships in your hands, do you not? A. Yes, I do.

Q. What is the distance on a Liberty ship from the bulkhead of the after deckhouse to the stern of the ship? A. 18 feet to the bulwark rail.

Q. And what is the width of the deck at that place by the after deckhouse, after bulkhead?

A. Approximately 30 feet.

(Testimony of Robert N. Nyborg.)

Q. This might be a trifle leading, but I don't think it would be objectionable. The after deckhouse might be likened to a square box placed on that part of the deck of a ship, might it not?

A. Yes.

Q. What is its purpose?

A. It has quarters in it, quarters for the crew.

Q. And on top of it is the after gun platform, is it not? A. Yes, sir.

Q. And that gun platform extends aft on the deckhouse over the deck, does it not?

A. Yes, sir. [89]

Q. Does it also, does the gun platform also extend forward of the deckhouse? A. No, sir.

Q. How far does the gun platform extend aft from the deckhouse? A. 10 feet.

Q. Then, aft of the deckhouse you have a space, if I understand you, of open deck 30 feet in width by 18 feet in length, at the longest longitude?

A. Yes. It is triangular in shape, the shape of the stern coming to a peak.

Q. And that is all open, clear space, is it?

A. Yes, sir.

Q. What is the headroom underneath the after gun deck platform?

A. There should be absolute clearance of 7 feet, six eleven, 6 feet 11 inches.

Q. 6 feet 11 inches? A. Yes.

Q. The after gun deck platform is reenforced or strengthened, is it not, by a lateral angle iron?

A. Beams, yes, angle-iron beams.

(Testimony of Robert N. Nyborg.)

Q. How far do they extend downward from the gun deck platform proper? [90]

A. 6 inches.

Q. 6 inches. Now, when you say that the clearance is, did you say 7 feet?

A. 7 feet beneath those beams.

Q. That is what I was going to say, you mean the clearance is 7 feet beneath the beams?

A. Yes, sir.

Q. Those beams are fore and aft, are they not?

A. Those beams——

Q. My associate says I called them lateral beams. I mean horizontal.

A. Yes, that is what I thought.

Q. Horizontal, but fore and aft?

A. Yes. The beam I was speaking of was running fore and aft. There are athwartship beams as well.

Q. Where are they?

A. In the same vicinity.

Q. Are they of the same size so that they leave the headroom as you described it, or otherwise?

A. No, they are not as deep as the beam I was speaking of.

Q. Not as deep?

A. They are 4 inches deep.

Q. So they would not affect the headroom?

A. No. [91]

Mr. Erskine Wood: That is all.

Mr. Tanner: No questions.

(Witness excused.)

The Court: Call your next witness.

Mr. Erskine Wood: I will call Captain Childs.

CAPTAIN RICHARD CHILDS

was thereupon produced as a witness in behalf of respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. Captain Childs, where is your home?

A. In Portland, Oregon, sir.

Q. What is your occupation?

A. Professional seaman.

Q. You are a Master now, though, aren't you?

A. Yes, sir.

Q. How long have you held Master's papers?

A. I have held Master's papers for close onto 15 years.

Q. Besides holding the papers, have you actually been Master of vessels? [92] A. I have.

Q. Are you a Master of a vessel now?

A. I am at present, yes, sir.

Q. How long have you been actually Master of vessels? A. Approximately 8 years.

Q. Did you serve as such during the war?

A. I did.

Q. What runs were you on in the war?

A. Well, on various runs, South Atlantic, Murmansk run, and the last two years of the war I put in the South Pacific.

Q. You mentioned the Murmansk run. You

(Testimony of Captain Richard Childs.)

mean that one that was so dangerous running up to the Russians?

A. Well, it was kind of warm at times.

Q. I believe you yourself lost a ship there, didn't you? A. I did, yes, sir.

Mr. Tanner: That wouldn't be material as far as this matter is concerned.

Mr. Erskine Wood: That is true.

Q. You are familiar, I take it, with the general construction of Liberty ships? A. I am.

Q. Particularly around the fantail?

A. Yes, sir.

Q. I don't know whether you have been in the courtroom all [93] the time, but the testimony here has been that some members of the crew hung some life rings from one of the fog buoys from underneath the after gun deck platform and suspended them there for the purpose of painting, lowered the fog buoy 6 or 8 inches for that purpose. I'd like to ask you in the first place what is the necessity for painting these life rings?

A. Well, they are constructed of cork with a canvas cover and that canvas cover must be protected by paint to keep rot away, and it is required by the United States Government Inspectors that they be kept in condition, and it is usual to paint them once a year.

Q. What would you say as to whether it was or was not a proper place to hang them to do that work?

A. Well, I would say that it is a proper place as it is more or less out of the weather, and if it

(Testimony of Captain Richard Childs.)

should be raining or blowing, why, you can at least keep them dry there.

Q. What space is there there for doing this work, how much of a space is there there?

A. Well, from the after bulkhead of the after deckhouse there to the, back to the bulwark rail, it would be approximately 18 feet in length by 28 or 30 foot in width.

Q. Would you say that was ample room?

A. I would, yes. [94]

Q. It is really an open deck there, isn't it?

A. It is an open deck. It is a continuation of the main deck.

Q. What is the diameter of the life rings?

A. 30 inches over all.

Q. I believe there was some testimony by Mr. Wilhite this morning that he couldn't pass under this fog buoy standing upright, but he would have to bend over if he wanted to avoid hitting his head. I would like to ask you whether or not there are many places on a vessel where a man has to duck his head, where he has to do it——

Mr. Tanner: Don't answer that. I object to that as being immaterial, irrelevant, your Honor.

The Court: Sustained.

Q. (By Mr. Erskine Wood): I'd like to ask you something, Captain, about the general hazards of a seaman's life on a ship in going about the ship, what he has to avoid——

Mr. Tanner: We object to that inquiry.

The Court: Sustained.

(Testimony of Captain Richard Childs.)

Mr. Erskine Wood: I don't want to impinge the Court's rule, but I would like to ask this: What are conditions on a ship in respect to the men having to go into many cramped quarters and narrow spaces to do their work.

Mr. Tanner: Well, we admit that, your Honor.

The Court: Sustained.

Q. (By Mr. Erskine Wood): These fog buoys are not all exactly alike, are they, Captain?

A. No, there are many different types of them. Some are constructed of metal and wood and some of wood alone.

Q. Well, can you give us an idea of the usual length of them?

A. Well, I have had them with me that would be around 5 to 6 foot in length on some ships, and then on other ships I have had them made of timber, 4 by 4 or 4 by 6 timber, that would go up to 10 or 12 foot in length.

Q. How much? A. 10 or 12 foot.

Q. If a ship is lying starboard side to the dock, as the testimony is in this case, and the man was called from aft on the fantail and a man was on the port side when he was called, what would be the normal way for him to go forward?

A. Well, normally I would say to go up the port side. It would be the side away from the dock and you would be away from cargoes being worked aboard with the ship's gear and away from the

(Testimony of Captain Richard Childs.)

gangway and any obstructions there pertaining to the cargo.

Mr. Erskine Wood: That is all. [96]

Cross-Examination

By Mr. Tanner:

Q. Doesn't it depend very largely, Captain Childs, whether or not there are some other obstructions or some other things at the various places when men choose their paths that they take to go from one place of the vessel to another, isn't it governed largely by the conditions that prevail?

A. Naturally it does, yes, sir.

Q. So that sometimes, when you say ordinarily they would go a certain route, why, you would alter that if there was some condition that might exist that would prompt him to go another route, wouldn't you?

A. If there were deck cargo on or anything else to make an obstruction there.

Q. Debris and such as that?

A. That is right.

Mr. Tanner: That is all.

Mr. Erskine Wood: That is all.

(Witness excused.)

Mr. Wood: I would like to call Mr. Wilhite.

The Court: Very well. Take the witness stand, Mr. Wilhite. [97]

BENJAMIN N. WILHITE

was thereupon recalled as a witness and, having been previously duly sworn, was examined in behalf of respondent and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. I would like to ask you, Mr. Wilhite, whether in giving your testimony about this matter some time last year when you gave a deposition, whether you didn't testify in this manner:

> "Question: Did you duck your head as you went under these logs?
>
> "Answer: I didn't then because I didn't know that was down. The life rings are hung so thick sometimes. I was parting them so I wouldn't get paint on me, see."

Do you remember——

Mr. Tanner: He has covered that.

The Court: Sustained. You asked him that question on cross-examination and he said that he didn't remember.

Mr. Erskine Wood: He only then said he didn't remember, your Honor.

The Court: That is right. That should close it, unless you have some reason to believe his memory has been refreshed since that time. It seems to me it is a question that has been put and answered on his cross-examination. [98]

Mr. Erskine Wood: I would like to ask him one other question.

The Court: Very well.

(Testimony of Benjamin N. Wilhite.)

Q. (By Mr. Erskine Wood): Now, on that occasion I will ask you if you testified like this:

"Question: What time of day did this accident happen?

"Answer: Well, I think it was about 4:30, something like that."

Did you testify so?

A. I don't remember, I am sure.

Mr. Erskine Wood: I will offer the portions of this deposition where he did so testify. I will put them in evidence. Pages 7 and 12.

Mr. Tanner: We can read it into the record.

Mr. Erskine Wood: Very well.

The Court: That might probably be the better way of getting it into the record.

Mr. Erskine Wood: I will read into the record according to the order of the Court.

"Question: Did you duck your head as you went under these logs?

"Answer: I didn't then because I didn't know that was down. The life rings are hung so [99] thick sometimes. I was parting them so I wouldn't get paint on me, see."

And the other portion which I read is:

"Question: What time of day did this accident happen?

"Answer: Well, I think it was about 4:30, something like that. It was in the afternoon.

"Question: It was in the afternoon?

"Answer: Yes."

The Court: Let the record show that the portion just read by Counsel was read from a deposition of the witness taken as an adverse witness on behalf of the respondent on—what date was the deposition taken?

Mr. Erskine Wood: June 15, 1946.

The Court: June 15. Call your next witness.

Mr. Erskine Wood: I would like to recall Captain Childs for a further question. [100]

CAPTAIN RICHARD CHILDS

was thereupon recalled as a witness in behalf of respondent and, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Erskine Wood:

Q. Captain Childs, this injury is said to have occurred on January the 20th, 1946. It relates to a seaman's employment and the continuity of it. I want to ask you since that time if there have or have not been tie-ups of shipping due to strikes?

Mr. Tanner: I am going to object to that as being immaterial and irrelevant.

The Court: Sustained.

Mr. Erskine Wood: That is all, Captain.

(Witness excused.)

Mr. Erskine Wood: That is respondent's case.

The Court: Any rebuttal?

Mr. Tanner: No, your Honor.

The Court: Now, do you gentlemen desire to file

briefs or make argument to the Court in this matter?

Mr. Tanner: We won't impose on the Court—we agree with the Court's observation that the facts are very simple. [101] If the Court wants any points on any matters we would be very happy to cooperate by submitting any information that the Court may desire on any law question that the Court may want to be informed on, but on the factual matters I think we wouldn't care to impose on the Court on those matters.

Mr. Erskine Wood: We do not desire to file any briefs. We should like to make short oral argument.

The Court: Very well. I will hear you.

Mr. Erskine Wood: Do you wish to open?

Mr. Tanner: I think if we waive—I had supposed that if Counsel—I might reserve for rebuttal, but I supposed when opening argument was waived that closed them off, but these new rules, your Honor——

The Court: That may be true, but then I feel inclined to let Counsel make a statement.

Mr. Tanner: Very well. Could we have just a little time to answer what observations he might make?

The Court: Yes, you will have opportunity.

Mr. Erskine B. Wood: May it please the Court, I only want to make a very short argument on the facts of this case.

First of all, the duty of care owed by the owner of the ship—in this case the United States Govern-

ment is the owner of the ship being sued—is merely that of [102] providing ordinary and reasonable care, and that would be conceded by Counsel, that there is no extraordinary duty. It is the usual common-law definition of negligence that the ship owner has to exercise reasonable, ordinary care for the protection of the seamen. Now, here we have a case that the afterdeck of this ship is 18 feet long by about 30 feet wide, as good a place as any on the ship for doing necessary work of painting life rings, from the fog buoy in underneath the overhang of the gun platform. It seems a clearly proper place to do the work.

Now, their witness, their first witness, Captain Carlsen, did talk about passageways. This wasn't a passageway at all, but he said where you had a passageway—which this was not—and you had some object hung overhead to obstruct one's passage you might guard it or protect is some way so men wouldn't run into it in the dark. His testimony was for the purpose of avoiding a man hitting it in the dark, bumping into it in the dark. This isn't in the dark. It is the testimony today the accident happened in the morning. The testimony in the adverse party deposition is that it was in the afternoon. Anyway, it was broad daylight, men working there. These ring buoys are white objects, all hanging from this beam. The thing was perfectly open, obvious and conspicuous. No one who looked could have [103] avoided seeing it. It was not a passageway. It was simply a place on the afterdeck of the ship where the men were doing this work.

Their witness, the boatswain, came here and testified that he was the man who had charge of superintending the work of the seamen aboard the ship. He was there. He admits seeing that the ring buoys were hanging from this beam. He saw the work was being done there and that the men were painting and he didn't think anything of it at the time. He, as I get the general drift of what he tries to say now, is that maybe he intended to imply that it was a dangerous condition, but he admits being there and seeing it, and if there was anything dangerous about it it was his job to correct it. Nobody thought anything of it at the time. And he then said that his mother had broken her hip and he was worried about that, but that certainly if it was a dangerous condition there a boatswain seeing it would correct it. And in another part of his testimony he said, "I saw it there but I didn't think anything of it."

So the facts are simple and they don't require any extended argument. Here was a beam hung under there from which there was plenty of room to walk under if you ducked your head, and it is admitted by Counsel that there [104] are many places all over a ship where you have to crawl through, passageways, all the watertight doors on ships——

The Court: Well, that is true, Counsel, but those kind of places the crew usually knows that they are narrow or unobstructed places and anticipate that they will be required to crawl or in some way make themselves smaller, but I believe the testimony here

is apparently without conflict that these beams or fog buoys were lashed under the gun deck in such a way that it wouldn't permit an upright passage by a workman under the beams. In other words, it was a place where it was not known there was a need to bend or make yourself small in any way in getting under. Now, the one beam, at least, apparently from the testimony, was low. It was lowered in such a way as to obstruct the headroom, unknown to the libelant.

Mr. Erskine B. Wood: Of course, it was in broad daylight with life rings hung from it.

The Court: Well, that is true, and had the contention been that the life rings themselves caused any injury your argument in my opinion might be very, very good, because they would give warning, but there was no injury that was caused by the life rings themselves.

Mr. Erskine B. Wood: Of course, the fog buoy would have to be lowered in order to put a lashing around the top [105] of it to hang these life rings onto, bring them low enough.

The Court: That is true enough, Counsel, and that appears obvious to us now, but whether it appeared so obvious to a workman busy at the time and expecting a free and unenhampered passageway so far as an overhead beam is concerned is doubtful. I think that the most that could be there is whether or not that the action of the libelant proceeding as he did constituted any degree of contributory negligence. That is the most that can be said.

Mr. Erskine B. Wood: We feel clearly it was negligence on the libelant's part, running into the objects, but we also feel no negligence whatever on the ship owner's part in simply having the men—the men have to paint these buoys someplace on the ship. They could go on one of the forward decks and hang them there, but somebody might, if he wasn't looking where he was going in broad daylight, run into whatever they were hung from on the forward deck. This was a convenient, accessible place in an area 30 feet by 20 feet and only a small portion of that area was used up by this buoy and the life rings hanging from it. It was part of the decks of the ship, one of the working spaces of the ship, and they were only engaged in doing normal ship's work on one of the working places of the ship. [106]

And, your Honor, by hindsight, looking back at this, you might say if something else had been done the accident wouldn't have happened, but here we have the boatswain who was on the job supervising this work, the men who lowered that, and all of them apparently at the time thought it was an ordinary, reasonable, prudent thing to do. We can only judge the ship owner's duty of ordinary and reasonable care by the conditions existing there at that time.

Now, where experienced seamen were there doing that work and none of them saw or foresaw any danger at that time, there is no negligence. It seems to me it comes down to the question of whether: Is it foreseeable that a risk has been created which is likely to result in an injury? And here with their

own witness, the boatswain, whom they don't apparently charge with being a careless man, and he said he thought nothing of that condition when he saw that the men were painting the life rings there; so, if you look at it from the point of view of foreseeability of an injury and the fact they were doing this work on a large open deck of the ship, taking up only a fraction of the space of that deck, lots of room elsewhere, in broad daylight, I can't in my own mind, your Honor, conceive that there is any negligence for which a ship owner could be liable.

Of course, there is also the element of proximate cause, your Honor, Dr. Raaf's testimony, whom you just heard, that in his opinion what bump this man received on his head is not sufficient to account for his injuries, and since you have just heard the Doctor's testimony I am not going to argue the point of proximate cause.

Mr. Erskine Wood: I would like to say just one word on the matter of proximate cause, your Honor. I would like to observe first that the only evidence they have put in at all of this injury, the only medical evidence, is an abstract of the records from the Public Health which merely contains a narrative statement from the man, the Public Health doctor, of what happened and the Doctor's diagnosis on that was that the man would go back to work in a week. That is all they did. They admit they sent this man to a Dr. Lucas in this town, their own doctor. They haven't called him, and the inference is Dr. Lucas would give unfavorable testimony. Now, we have called Dr. Raaf, one of the most emi-

nent brain men and neurological men in the city, and he has given it as his opinion that this trouble doesn't come from this blow.

The Court: That is true. I listened to the Doctor's testimony with interest. He made an examination and he didn't say that he found anything in his examination which would justify the symptoms that the plaintiff complains of, [108] in other words, that no other cause—he said that other things could have caused it. Then he made an examination and he didn't say there was anything that he found that he could attribute the symptoms to.

Mr. Erskine Wood: I don't think that I agree with your Honor's interpretation of the Doctor's testimony. He said that when he examined the man in the beginning, he said if the man's story is true these subjective symptoms could have come from this, if his story is true.

The Court: That is true.

Mr. Erskine Wood: But at that time the man's story was that he had sunk to his knees from the force of this blow, which is not true, but now Dr. Raaf says with the continued persistency of these symptoms, accompanied by the fact the man has high blood pressure, leads him to believe these symptoms come from high blood pressure or some other of many other causes.

The Court: That was the point that I was making, Counsel. The Doctor said there might be many other causes. The Doctor, aside from high blood pressure, on his examination found no other conditions or cause that he attributed the symptoms to.

Mr. Erskine Wood: I don't think he has to point out what the symptoms come from when he says, "I don't think [109] they come from this." Now, I don't want to file any brief, as I said, but I do want to cite to your Honor Judge Taft's decision when he was on the Circuit Court of Appeals in the case of Ewing against Wood. I will cite it to you, send it to your Clerk, furnish Counsel the citation, in which a case quite similar to this, involving vision, and he said that the Court cannot speculate on cause. If the injury could be received from several causes the Court can't guess at them. The plaintiff must fail because the plaintiff's testimony must point to the fact not only that they probably caused this result but it did cause it. I would like to cite your Honor that case.

The Court: I would be very happy to read it, because I certainly wouldn't at this stage at all put my opinion against that of Judge Taft.

Mr. Tanner: Well, your Honor, you needn't have any hesitancy in failing or neglecting or refusing to follow Judge Taft's interpretation of the Federal Employers' Liability Act. The very language of which he discusses received very careful attention by our Supreme Court in a very recent decision which I would like to direct your Honor's attention to, the case of Tennant vs. Peoria & Pekin Union Railway, 64 Supreme Court 409.

The Court: Is that the official citation of that?

Mr. Tanner: I don't have it.

The Court: Will you get it and give it to my secretary?

Mr. Tanner: I will do it and send it to you. But very recently they have re-examined the duties that the law imposes on an employer; and while I dislike very much to contradict Counsel in his statement of the law——

The Court: Doesn't the evidence here establish the duty?

Mr. Tanner: Yes, of course it does.

The Court: Isn't the testimony uncontradicted here that the proper way to lash these beams was to lash them in such a way that there would be a 7-foot clearance?

Mr. Tanner: That is the question.

The Court: There seems to be no conflict on the evidence in that as to what ordinary care consisted of in that degree. There is one matter I would like to hear from you on, though, Counsel, and that is this: In the event that I should determine that there was a failure to exercise ordinary care as far as the seaman was concerned, I would like to hear from you as to that. What is your contention?

Mr. Tanner: Well, my contention is that we are entitled to a substantial award.

The Court: How long do you contend for maintenance [111] and cure?

Mr. Tanner: Four months.

The Court: Very well. Now, as to what——

Mr. Tanner: We maintained the maintenance and cure is four months and wages, special damages for a like period.

Now, on the general damages, your Honor, we have got a man who in the period of his usefulness

—and not an old man by any means, sixty-one—in whom those intimately associated with him observe a marked change in his entire personality, and we believe, your Honor, that when those changes are brought about as abrupt as these were brought about in this case and under the circumstances under which they were brought about, we believe that $12,500 would not be amiss, and I believe, your Honor, I can find ample cases where in admiralty they have allowed such amounts. That would be my idea. If the Court wants to know what would be a fair award, I would say not less than $12,500.

The Court: But, under the testimony of the libelant there has been to some extent a continuous improvement in his condition. He is able to work and has worked, and from that it would be reasonable to believe that his improvement would continue.

Mr. Tanner: Your Honor, it's been a year, and I invoke [112] the presumption that is referred to in the Lexographer on the doctrine of evidence that when conditions have existed over a period of time the presumption is they will continue, and this is a long period of time.

The Court: The conditions haven't existed. They are getting better. They haven't remained steady.

Mr. Tanner: He has said, your Honor, it is true, that some of these symptoms are not as bad as they were. There is no question but what there has been improvement. I don't mean to misstate the evidence. But he is unable to work; he can't do the

type of work that he had formerly done, and isn't able to do it at the present time. That is why I think, your Honor, we are entitled to a substantial award.

The Court: Well, I have a little different version of the evidence. Very well, the matter will be——

Mr. Erskine Wood: May I say a word on the question of damages since your Honor has asked about it. Evidently, as I gather your Honor's state of mind, you feel that there is liability here on the part of the ship, but certainly I am not going—I am just going to mention that certainly there is contributory negligence on the part of the man. I don't believe that needs argument, and I submit that to you.

The Court: Of course, I have had that in mind, Counsel. [113] It is one of the questions in the case as to whether or not there was contributory negligence.

Mr. Tanner: In examining the record I find nothing of that in the pleadings. That is an affirmative defense and it don't seem to be in this trial until now.

The Court: I don't think it is. If it appears from the plaintiff's case, it is——

Mr. Tanner: Of course, if it appears from the plaintiff's case, but I submit, your Honor, there is not one scintilla of evidence in the plaintiff's case, as far as I can garner, that would indicate that he wouldn't be exercising the care that would be expected of a workman.

The Court: Well, of course, all of the evidence as to what occurred at the time is in the plaintiff's case, and it was given either by the plaintiff or witnesses who were there, and no testimony on behalf of the defendant there; none of their witnesses were there. Very well. The matter will be taken under advisement by the Court and Court will stand adjourned until 10:00 o'clock tomorrow morning.

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

We, Cloyd D. Rauch and Glenn G. Foster, do hereby certify that we jointly reported in shorthand proceedings had at the trial of the above-entitled cause, that we subsequently caused our said shorthand notes to be reduced to typewriting, and that the numbered pages set opposite our names below were by us respectively transcribed from that portion of the testimony and proceedings reported by each of us in shorthand:

Cloyd D. Rauch, pages 1 to 74, inclusive;

Glenn G. Foster, pages 75 to 114, inclusive;

and we hereby further certify that the said pages so set out opposite our respective names constitute a full, true and accurate transcript of that portion of the testimony and proceedings so reported in shorthand by each of us as above certified, including objections and motions of counsel, rulings of the Court, exceptions taken, and other oral proceedings had at said trial.

Dated this 28th day of March, A. D. 1947.

/s/ CLOYD D. RAUCH,
Court Reporter,

/s/ GLENN G. FOSTER,
Court Reporter pro tem.

[Endorsed]: No. 11583. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Benjamin N. Wilhite, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 12, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NO. 11583

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BENJAMIN N. WILHITE,

Appellee.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB CO., PORTLAND

SUBJECT INDEX

NO. 11583

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BENJAMIN N. WILHITE,

Appellee.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF CASE

This is an admiralty appeal. If it depended on disputed questions of fact, it would not have been taken. But it does not so depend. It involves the simple question whether the trial judge drew the proper conclusions from the undisputed facts. He concluded that the respondent had negligently caused libelant's injuries, and that $2500 was a proper award of damages, and that

libelant was not guilty of contributory negligence. We contend, on the contrary, that he should have concluded (1) that respondent was not negligent; (2) that even if it were, libelant was contributorily negligent; and (3) that $2500 was too much.

Whether the trial court was right or wrong depends on an answer to this question: Can a ship's carpenter, who, in broad daylight, and without looking where he is going, bumps his head on a fog buoy suspended horizontally under the gun platform of a ship, leaving nearly 6 feet of headroom, collect $2500 damages? Especially when the only doctor who testified said that he did not think libelant's present symptoms of headache, etc., proceeded from the injury?

THE FACTS

The facts are quite simple. The ship was a Liberty ship. Wilhite was the carpenter. The after deck space on a Liberty ship is 18 feet fore and aft from the after deck house to the bulwark rail at the stern, and approximately 30 feet wide athwartships. This is all clear deck space. On top of the after deckhouse is a gun platform, and this extends 10 feet aft over the deck space just described and about 7 feet above it. This projecting gun platform is supported by angle iron 6-inch beams. The clearance between those beams and the deck beneath is 6 feet, 11 inches, or, say, 7 feet. It was the custom during the war to carry "fog buoys" to be trailed behind a ship in thick weather to enable the following ship, in convoy, to keep her position. These fog buoys

were not all exactly alike, but were often wooden beams approximately 6 by 6 inches, and of varying lengths, with a spike, or something of that nature, driven through the end of them to create a wake when dragged through the water. These, when not in use, were carried at convenient places about the ship, and on this particular ship there were two of them, and they were lashed beneath the projecting gun platform described. No one denies the propriety of this.

At the time of the accident to Wilhite one of these fog buoys had been slightly lowered in its lashings so that some life rings could be suspended from it to enable a couple of sailors to paint them. When so lowered the fog buoy was not quite 6 feet above the deck, according to Wilhite, who says that he is 5 feet, 11 inches tall, and that if he had been walking erect he would have bumped his forehead against it. (Ap. 71). The place between the gun platform, where the fog buoys were suspended, was admittedly a proper place to keep them, and the deck beneath it was not a passageway, but was merely a part of the whole open deck space before described, i.e., 18 feet long by 30 feet wide. The only evidence of the accident at all is the testimony of Gill, the bos'n, and of Wilhite himself. As they do not substantially differ, we summarize that of Wilhite. He says that he was doing some work on the deck aft, port side, and received an order from the mate, transmitted by a sailor, to hurry forward and attend to the anchor. He started across the deck to the starboard side, passing beneath the fog buoy and through an opening about 30 inches to 3½ feet wide between the suspended life rings,

and, observing the life rings, but not the fog buoy, bumped the top, or, as he sometimes describes it, "the back" of his head against it. He slightly staggered, but was not knocked down or made unconscious, and went forward on his errand amid the laughter of the sailors and the bos'n. He admits that he did not look where he was going, but says "I was looking down because there was something lying on the deck I had to step over", and that "In fact when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping". The significant portions of his testimony are:—

"Q. Now, you saw these sailors painting the life rings there, did you?

A. I don't believe they were painting during that time. They might have been.

Q. What were they doing, Hanging them up?

A. They were already hung up.

Q. You saw that?

A. Yes, I remember seeing the life rings up.

Q. And when you got this order to go forward to the anchor, just tell us again how you walked or what you did. You said you didn't run. You walked, didn't you?

A. Well, I always walked at a good, stiff walk. I never was slow at walking.

Q. And did you look where you were going?

A. I was looking down, because there was something laying on the deck I had to step over.

Q. What was it?

A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea.

Q. Well, now, what was it? Was it litter, or was it a pipe, or what was it?

A. Well, I don't remember. I couldn't say. I

just don't remember what it was.

Q. And how many steps had you taken before you hit your head? Approximately, I mean?

A. Oh, three or four, something like that.

Q. And did you stoop to go under this thing?

A. No. I generally walk pretty straight, but you wore a seaman's cap, you know—I always wore a seaman's cap.

Q. You didn't stoop to go under it?

A. No; I never walk with a stoop.

Q. I didn't mean habitually. I mean you didn't duck your head to go under it? A. No.

Q. You saw the life rings hanging there?

A. Yes, sir, that is right. There was a space between the life rings. They left it there.

Q. What do you suppose they were hanging from?

A. I don't know that I noticed. In fact, when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping.

Q. As you approached the fog buoy and the life rings you took your hands to part the rings, didn't you, so you wouldn't get paint on you, didn't you?

A. No; there was a space, I would say, about that wide, a passageway through.

Q. You didn't do anything to the life rings to keep from getting paint on you? A. No.

Q. And you didn't duck your head?

A. No.

Q. And you walked straight forward?

A. Well, I generally do. I don't just remember what position——

Q. And you didn't stoop?

A. No.

Q. Well, how did you hit the back of your head?

A. Just the top of it, like that (indicating). You see, the bottom was lashed down on the forward end of it. The forward end of it was laying on a vent that comes from a toilet on the stern of the ship. That is where the soldiers or the Navy crew stay, and that was laying on top of that. One

end was lower, you see, than the other.

Q. One end was what?

A. One end was lower. It was kind of on a slope, you see.

Q. You mean the forward end was lower?

A. That is right.

Q. And is that the end you hit on?

A. That is right.

Q. How tall are you?

A. I am five feet eleven and a half inches.

Q. Five feet eleven and a half inches; so, without stooping, and walking erect, you just barely hit the top of your head, is that it?

A. Well, it hit me enough to stagger me quite a bit." (Ap. 66-69).

He also said it happened in the "forenoon", (Ap. 71) and that the seamen and the bos'n laughed about it (Ap. 71), and that if he had been walking perfectly straight it would have hit him on the forehead. (Ap. 71).

On his deposition given before trial he testified that the accident happened at 4:30 in the afternoon, and that as he went between the life rings he was "parting them so I wouldn't get paint on me, see." (Ap. 107). This last he denied at the trial. (Ap. 68).

These are the simple facts from which the trial judge concluded that Wilhite was in no way negligent, and that the respondent was.

This brings us to the

FIRST SPECIFICATION OF ERROR

The trial court erred in holding the respondent liable at all in damages. (First Assignment of Error, Ap. 19).

It does not seem to us that this requires much argument because the thing seems palpable. The man was not even passing through a passageway. He was passing across an open deck. It was much as if a man walking along the street should bump into a lightpole on the curb and then sue for damages. It is not disputed that beneath the gun patform was a proper place to stow the fog buoys. The only claim is that because one of them had been slightly lowered, there was not sufficient headroom, although it is admitted that the headroom was nearly 6 feet. It was not dark. It was broad daylight and Wilhite saw the life rings suspended there and must have known that they could only be suspended from one of the buoys, and that the natural thing would be to lower the buoy a little to get the lashings over it. The charge in the libel is that the "timber" was not "lashed at a height which would permit libelant to pass thereunder without collision therewith". (Ap. 4). But it *would* "permit" him to pass. All he had to do was bend over a little. What any man would do. We submit that almost 6 feet of headroom is plenty for any sailor who knows what he is about and looks where he is going, especially when the space is not a confined passageway but an open deck.

The bos'n who was right there and saw the whole arrangement did not at that time think it was negligent, although he testified for Wilhite on the trial. But although he was in charge of the work, it never occurred to him at the time to do anything about it. There is no suggestion that he was not a competent man, and if negligence is the failure to use the care of an ordinarily

careful man, here we have a supposedly ordinarily careful man sanctioning what was going on.

The trial court, in the course of his remarks during the short oral argument, asked: "Isn't the testimony uncontradicted here that the proper way to lash these beams was to lash them in such a way that there would be a 7-foot clearance?" (Ap. 117). Libelant's counsel, to whom the question was addressed, did not answer it. But the question intimates a confusion in the judge's mind. There was no such "uncontradicted testimony". All the testimony there was on that point is the following:—

Loren Carlsen, a ship's master (but not of this ship), friend of Wilhite, testifying for him, said that these fog buoys are lashed in any convenient place, and that when lashed under a gun platform they could be lashed right up "against the ceiling", "but not necessarily" (Ap. 32), and that "I mean by that that there's so many places that you could stow a thing on a ship, but if you did lash anything you would lash it in the clear and leave a passageway for someone. That is the general idea." (Ap. 32-3). And "Well, I would say any place in the stern that is frequented by the crew, even if there was a good six-foot-six clearance it wouldn't be safe, because a tall person walking aft *in the dark* would possibly injure himself." (Ap. 33). The Court will surely not overlook "in the dark".

Gill, the bos'n, and also a friend of Wilhite, testified only that the clearance between the channel iron and the deck was about 7 feet (Ap. 42), and that the fog

buoy had been lowered about 6 or 8 inches (Ap. 40), and that the then clearance between it and the deck was "about 6 feet or a little less". But he nowhere said that this was not enough.

Wilhite nowhere testified that the clearance was improper.

Neither did Constantine George, libelant's other witness.

Neither did Captain Childs, respondent's witness who testified that beneath the gun platform was a proper place to suspend the life rings from the fog buoys for the purpose of painting them. (Ap. 102-3). Neither did Mr. Nyborg, respondent's other witness, although an answer he gave may have lead to the judge's apparent misapprehension when he asked the question: "Isn't the testimony uncontradicted here that the proper way to lash these beams is to lash them in such a way that there would be a 7-foot clearance?" Mr. Nyborg was a naval architect who was called merely to give the dimensions of this part of a Liberty ship. He testified, sitting in the witness chair with the plans of a Liberty ship in his hands. (Ap. 98). As he testified he measured off on the plans, or read the figures thereon, and, so testifying, he gave the dimensions as 18 feet from the after deckhouse to the bulwark rail, (Ap. 98), width of the deck 30 feet (Ap. 98), extension of the gun platform over the deck 10 feet (Ap. 99), and then was asked the question: "What is the headroom underneath the after gun deck platform?" And then, referring to the plans in his hand, and calculating aloud, he said:

"A. There should be absolute clearance of 7 feet, six eleven, 6 feet 11 inches.

Q. 6 feet 11 inches? A. Yes.

Q. The after gun deck platform is reenforced or strengthened, is it not, by a lateral angle iron?

A. Beams, yes, angle iron beams.

Q. How far do they extend downward from the gun deck platform proper? [90]

A. 6 inches.

Q. 6 inches. Now, when you say that the clearance is, did you say 7 feet?

A. 7 feet beneath those beams.

Q. That is what I was going to say, you mean the clearance is 7 feet beneath the beams?

A. Yes, sir."

Two things are perfectly apparent here. First: That Nyborg was using the word "should" in the conventional manner of a calculator, referring to plans, and computing in his head,—"thinking aloud" as the saying goes. Second: That he was referring only to the clearance between the channel irons and the deck itself, and not to any clearance between a suspended fog buoy and the deck; nor was he attempting to say what "the proper way to lash these beams was", or that the proper way was "to lash them in such a way that there would be a 7-foot clearance", as asked by the judge. He was not testifying about the beams at all, nor the proper way to lash them. Nor would he have been qualified to do so, not being a ship's officer, or even pretending to have had any experience at sea.

So, to sum this up, there is not in the whole record any statement of fact by any witness that this clearance of nearly 6 feet on an open deck was improper, and the judge's apparent assumption that there was such evi-

dence, and that it was "uncontradicted" is entirely a misapprehension.

WARNING

The other charge of negligence in the libel was that Wilhite was not "warned" of the "unsafe and unseaworthy position of said timber". (Ap. 4). Our answer to this is short. He knew the timber was there. He saw the life rings suspended from it. The only claim he makes is that he did not know it had been lowered. He should have known even that, since it would be extremely difficult, if not impossible, to suspend the life rings from the timber without lowering it. But whether he saw it, or should have seen it, is beside the point. The point is that a ship owes no duty to warn a seaman of a beam which, in its proper place, though slightly lowered, still leaves almost 6 feet of headroom to pass under; and that a seaman, in broad daylight, can be expected to walk under it safely.

SECOND SPECIFICATION OF ERROR

If the respondent was negligent, the trial court erred in not finding that the libelant was guilty of contributory negligence. (Third Assignment of Error, Ap. 19).

It is unnecessary to argue this. What we have already said, to show that respondent was not negligent, and that Wilhite carelessly and stupidly blundered into this beam without looking where he was going, has made

our point clear. If, in spite of what we have shown, this Court should feel that respondent was in anywise negligent, which, of course, we deny, then certainly it seems to us that Wilhite must be held to have been contributorily negligent. To hold the respondent at fault, and say that Wilhite was entirely without fault himself seems to us, on the face of the evidence, the clearest error.

The trial court himself was troubled about this. He realized it was one of the questions in the case, as witness his remarks on Pages 117, 119 and 120 of the Apostles. But he concluded against us on that point. And in drawing that conclusion we think he was clearly wrong. We shall not reargue it.

THIRD SPECIFICATION OF ERROR

The trial court erred in allowing libelant $2500 general damages, the same being excessive. (Second Assignment of Error, Ap. 19).

The trial court allowed Wilhite:

Four months' loss of wages, i.e., to the end of vessel's voyage	$ 670.00
Four months' maintenance and cure at $3.50 per day	420.00
General damages	2,500.00

It is the general damages, $2500, of which we now complain.

We review briefly what happened to libelant. He bumped the top, or "back" of his head. He staggered

and "the boys laughed at me", and though dazed, he continued on his errand and did his work at the anchor. (Ap. 51). Feeling dizzy, he went to his bunk, stayed there part of the time on the voyage on to Vancouver, B. C., had a headache, went to the hospital in Vancouver, B. C., got tired of staying there, didn't like it, and left. (Ap. 51 and 53). Came back to Portland, went to the Public Health, who told him to "lay around and keep quiet", (Ap. 54), and, according to the Abstract of Clinical Record, libelant's Exhibit 1 (which, however, we do not have before us) told him he would be fit to go back to work "in a week". (Ap. 114). He complained of some double vision and the Public Health sent him to Dr. Lucas, who examined his eyes and apparently gave him glasses. (Ap. 55). Over the next several months following his injury he had some headache "of a night", (Ap. 55), and he has a "dull feeling" and a "buzzing" which wakes him at at night. (Ap. 56). But "it is getting some better". (Ap. 57). And he said he couldn't do the work he used to do. That is the substance of his testimony.

Now three things stand out very prominently in the record. They are these:

1. The diagnosis of the United States Public Health Service in Portland was that he would be disabled "one week". *Libelant's counsel did not call these doctors to testify.*

2. The Public Health Service sent Wilhite to Dr. Lucas in Portland to examine his eyes for double vision. *Libelant's counsel did not call Dr. Lucas to testify.*

3. *The only doctor who testified was Dr. Raaf,* and he testified that Wilhite's symptoms *were not,* in his opinion, *the result of the injury.* (Ap. 91 and 93). And that they could result from the high blood pressure, which his tests showed Wilhite to have. (Ap. 92-93).

In the face of this, when there was no medical testimony *at all* that Wilhite's headache, dizziness, double vision, or what not, came from the injury, how could the court award $2500 damages?

CONCLUSION

When the court allowed Wilhite wages to the end of the voyage and maintenance for four months, it treated him very generously considering the one week's disability, which the Public Health allowed him, and considering Dr. Raaf's testimony. The award of $2500 general damages was unwarranted. We urge that the decree be modified accordingly.

Respectfully submitted,

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NO. 11583

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN N. WILHITE,
Appellee.

ANSWERING BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States, for the District of Oregon.

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SUBJECT INDEX

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UNITED STATES OF AMERICA,
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vs.

BENJAMIN N. WILHITE,
Appellee.

ANSWERING BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States, for the District of Oregon.

Appellant's counsel in their opening brief bluntly pose the following question:

> "Can a ship's carpenter, who, in broad daylight, without looking where he is going, bumps his head on a fog buoy suspended horizontally under the gun platform of a ship, leaving nearly 6 feet of headroom, collect $2500 damages?"

We do not believe appellant's case can be fairly stated so simply. We believe the question disclosed by the record is more fairly stated as follows:

> "Can an employer of seamen so impair the overhead clearance of a proper passageway used by members of the ship's crew, without responding in damages for injuries sustained by a crew member using such passageway without notice of the impaired clearance?"

We believe the evidence fairly poses such a question and that under the authorities such question must be answered in the negative. We further believe that the amount allowed by the court under the circumstances disclosed by the evidence in this case was a very modest award.

Consideration of the question posed by the appellant and the question posed by appellee require a better and fairer understanding of the facts than is reflected in appellant's brief. The statement of facts set forth by the appellant's counsel in their opening brief correctly reflects much of the testimony. Care has been used to omit testimony tending to disclose chargeable negligence on the part of the employer. Corresponding diligence has been used to set forth all the facts from which an inference could be drawn that the libelant in the circumstances of his injury was not using due care. No useful purpose would be served by repeating or even summarizing the facts disclosed by the evidence. The court will read the entire record. We shall deal with the specifications of error in the order in which they appear in appellant's brief.

FIRST SPECIFICATION OF ERROR

Under this specification appellant argues that the trial court erred in holding the respondent liable at all in damages. We are told by appellant's counsel that this specification does not require much argument. Then follows this glaring and inexcusable misstatement of the evidence:

> "The man was not even passing through a passageway. He was passing across an open deck." (App. Brief p. 7).

The witness Thomas Gill, under whose direction the work was being done at the time of libelant's injury, gave the following testimony:

> "Q. (By Mr. Tanner) Now, I will ask you whether or not the passageway that he was using in response to the order that he had received was a proper passageway for a member of the crew to use?
> A. It was, yes, sir." (Ap. 41).

We do not believe we could improve upon the clarity of the language used by the trial court in rejecting a similar argument that was made at the time of the trial. We quote the argument advanced by one of appellant's counsel during the trial and the reply which the court made to it:

> "(By Mr. Erskine B. Wood) So the facts are simple and they don't require any extended argument. Here was a beam hung under there from which there was plenty of room to walk under *if you ducked your head,* and it is admitted by counsel that there are many places all over a ship where you have to crawl through passageways, all the

watertight doors on ships—(Italics ours)

"The Court: Well, that is true, counsel, but those kind of places the crew usually knows that they are narrow or unobstructed places and anticipate that they will be required to crawl or in some way make themselves smaller, but I believe the testimony here is apparently without conflict that these beams or fog buoys were lashed under the gun deck in such a way that it wouldn't permit an upright passage by a workman under the beams. In other words, it was a place where it was not known there was a need to bend or make yourself small in any way in getting under. Now, the one beam, at least, apparently from the testimony, was low. It was lowered in such a way as to obstruct the headroom, unknown to the libelant." (Ap. 111-112).

It is argued by appellant's counsel in support of this specification of error that the evidence does not show that the beam under which the libelant attempted to pass had been improperly lashed. With reference to this beam the witness Gill testified:

"Q. (By Mr. Tanner) When it was in proper position I will ask you whether or not there was adequate clearance for men to use the companion way in their quarters on the afterdeck of the vessel?

A. When it was properly secured, it was." (Ap. 39).

Then, further in his testimony, referring to the same beam the same witness said:

"A. It had been lowered about six or eight inches, so they could attach some lines to it, to paint them.

Q. Now whenever they had occasion to lower an appliance or a device of that kind under those circumstances, what are the usual and ordinary precautions that are taken, if any?

A. You usually put an obstruction there or you tie a line across so that a man can see that there is something to watch for when he is going through that area; either that or you have a man there to stand to watch and warn people.

Q. Was there any warning given to Mr. Wilhite?

A. No, sir, there wasn't. I didn't know that they had lowered the fog buoys or I would have had a line there myself. That is one of my jobs.

Q. Do you know who lowered it?

A. No, I don't know who done it, but I had sent two men back there to paint the life buoys and they had lowered it down so that they could tie the rings up with it.

Q. And there was no warning any place?

A. No, sir, there wasn't." (Ap. 40-41).

The fact that libelant encountered the beam with his head seems conclusive that the overhead clearance had been impaired.

Appellant's counsel says as to these facts:

> "It was much as if a man walking along the street should bump into a lightpole on the curb and then sue for damages." (App. Brief p. 7).

We believe that the facts more nearly resemble cases dealing with traps for which an owner of land had been made liable even to a trespasser, when injury results. It seems to us that a person would have a better opportunity under the circumstances disclosed by the evidence in this case to protect himself against a wire stretched across his passageway at ankle height than he would from an overhead obstruction of a few inches.

The libelant invokes, as he has the legal right to do, the protection of the Federal Employers' Liability Act which makes the shipowner liable for injury to its em-

ployees resulting "in whole or in part from the negligence of any of the officers, agents or employees * * * or by reason of any defect or insufficiency due to its negligence in its * * * appliances, machinery * * * or other equipment." 45 *U.S.C.A.* Sec. 51.

Mahnich v. Southern S. S. Co., 321 U.S. 96; 64 S. Ct. 455.

46 *U.S.C.A.* Sec. 688.

Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S. Ct. 872.

Carlisle Packing Co. v. Sandanger, 259 U.S. 255; 42 S. Ct. 475.

SECOND SPECIFICATION OF ERROR

This specification of error deals with appellant's claim that libelant's own negligence contributed to his injury. Appellant's counsel blandly asserts at the outset of their argument that it is unnecessary to argue this specification of error. It is said that Wilhite "carelessly and stupidly blundered into this beam without looking where he was going." We see no reason why Wilhite should have anticipated his employer's negligence in lowering the beam. Had the beam not been lowered he would have had a safe passageway. The law is well settled that one need not anticipate another's negligence. As we understand these authorities, one may base his conduct upon the assumption that others have used due care. Wilhite could hardly have been expected to look or take any precautions for his own safety when he had no notice or knowledge that the overhead clearance of

the passageway had been impaired. The trial court considered this contention. When this argument was made in the court below it was disposed of clearly and concisely. We quote the following from the record:

> "Mr. Erskine B. Wood: Of course, the fog buoy would have to be lowered in order to put a lashing around the top of it to hang these life rings onto, bring them low enough.
>
> "The Court: That is true enough, counsel, and that appears obvious to us now, but whether it appeared so obvious to a workman busy at the time and expecting a free and unenhampered passageway so far as an overhead beam is concerned is doubtful." (Ap. 112).

In appellant's counsel's zeal to show contributory negligence, they completely failed to give any significance to the following testimony:

> "Q. (By Mr. Erskine B. Wood) And did you look where you were going?
>
> A. I was looking down, because there was something laying on the deck I had to step over.
>
> Q. What was it?
>
> A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea." (Ap. 67).

Considering this specification of error in another aspect, the ship was rendered unseaworthy as the result of the lowering of the beam. The shipowner owes a nondelegable duty, which is absolute and continuing, to provide workmen with a safe place in which to work. Modern authorities seem to adopt the view that a ship rendered unsafe as the result of the shipowner's negli-

gence is unseaworthy. Ancient authorities hold an employer liable for injuries resulting from unseaworthiness. Such liability is based upon humanitarian considerations quite apart from principles springing from tort or contract liability. We quote the following from the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85; 66 S. Ct. 872, 877:

> "Derived from and shaped to meet the hazards which performing the services imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U.S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L.R.A., N.S. 1157; Carlisle Packing Co. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

THIRD SPECIFICATION OF ERROR

In appellant's third specification of error appellant complains of the general damages which were awarded by the court in the amount of $2500.00. Appellee was quite as disappointed as appellant. We felt at the time of trial that the evidence justified a more substantial award, and we so indicated to the trial court. (Ap. 117-118).

Wilhite described his injuries not only at the time of trial but to the doctor that examined him at appellant's request. Appellant's counsel asked Dr. Raaf concerning the symptoms of which he complained. We believe the doctor's answer disclosed a physical condition that

would warrant a much larger award. We quote the doctor's answer:

> "A. He stated that on January the 23rd, 1946, he was on a boat, raised up suddenly and hit his head on a 6 by 6 timber, fell to his knees, felt stunned, but was not unconscious. Although he had a headache he continued to work. The next day his headache persisted and he felt as if he could not walk straight. He went to Vancouver, British Columbia, was paid off the ship on the advice of a physician. His headache persisted and was so severe he stopped enroute to Portland because any jarring aggravated his condition.
>
> "He noted some variable double vision during, or since the injury, which is not constant but is present every day, but he said it would come and go during the day. He has not been able to drive his car since the injury because of the double vision, the headache, and a little dizziness. His headache is less severe, but the double vision is as marked as ever. He has continuous ringing in the ear since the accident. He has never been unconscious since the accident. He awakens at night with his head throbbing. His eyes bother him some and his vision is blurred when he reads. Since the accident the arm feels numb at night but this does not occur in the daytime." (Ap. 89-90).

Appellant's counsel sought to avoid the effect of this testimony by attempting to prove that the symptoms which the doctor described were due to other causes. The following testimony appears in the record:

> "Q. What other possible causes could be of these headaches and dizziness and things he complains of?
>
> A. I assume you mean the headaches and dizziness that he now complains of at the present time?
>
> Q. Yes.
>
> A. Well, of course, they could be due to things

like high blood pressure or anxiety or constipation or any sort of illness; any number of illnesses can cause headaches.

Q. You mentioned high blood pressure. Did you in your examination of him find out anything about his blood pressure?

A. His blood pressure at the time I saw him was 174 over 110, which is an elevated blood pressure.

Q. Would that be a possible cause of these symptoms?

A. Could be." (Ap. 92).

The foregoing testimony must be considered in the light of the previous testimony given by the doctor in which he stated that he found no objective symptoms at all which would account for Wilhite's headaches. This is what the doctor said:

"Q. And did you examine him particularly for an alleged injury to his head resulting in headaches and so forth?

A. I did.

Q. Did you find any objective symptoms at all?

A. I did not." (Ap. 89).

We believe that the conclusion which the trial court made concerning the doctor's testimony is a fair one and the only reasonable interpretation that can be placed upon it. The trial court said:

"The Court: That is true. I listened to the doctor's testimony with interest. He made an examination and he didn't say that he found anything in his examination which would justify the symptoms that the plaintiff complains of, in other words, that no other cause—he said that other things could have caused it. Then he made an examination and he didn't say there was anything that he found that he could attribute the symptoms to." (Ap. 115).

In this state of the record how can it successfully be argued that Wilhite's symptoms were due to causes independent of the injury? It is a difficult problem to determine the amount of general damages for a physical injury. Courts as well as jurors differ widely in their awards. The subject matter of amount of awards by trial judges is discussed in 3 Am. Juris., Sec. 907, at p. 474, from which we learn:

> "Findings and awards as to damages will not be disturbed on appeal unless manifestly erroneous, or so shocking to the judicial conscience, or so excessive, as clearly to show that it was the result of passion or prejudice."

Judge Rudkin, in *Luckenbach SS Co. v. Campbell,* 8 Fed. (2d) 223, had occasion to discuss an award in an admiralty case in which the trial court had allowed $5,000.00 for wrongful death, and which award was assailed on appeal. The court pointed out that after considering the evidence relating to pain and suffering, and other evidence in the case, it could not be said that the amount of recovery was excessive, "or so excessive as to justify interference by an appellate court."

In the case of *The Heranger,* 101 F. (2d) 953, 957, we find the following succinct statement for the rule, the application for which we now contend:

> "From a careful review of the record in this case we find that there is substantial evidence to support the findings of the trial judge. This court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law. The Mabel, 9 Cir. 61 F. 2d 537."

Libelant's injuries were painful and severe. He was taken off the ship at the request of the doctor. He was complaining of symptoms for over a year following the injuries. Captain Carlson, who had sailed with Wilhite, and who was a disinterested witness, described his condition following his injury as follows:

> "At first I wasn't aware consciously, but one thing I noticed, that he—I mentioned certain persons that both of us knew quite well and he didn't seem to remember much about them; in other words, it seemed as though his memory was a little vague and that—well, just his general appearance; he didn't seem to be alert mentally as much as he always had been before.
>
> Q. And how was he physically, with reference to his alertness and his general physical condition? What did you notice?
>
> A. Well, I had known him to be very active, in fact more active than most young fellows that I know, and I noticed that he was very sluggish, and I didn't know the reason for it at the time, and, being no doctor, I could just say that I could see something had happened, I didn't know what, but I know very well that he was a different man." (Ap. 35, 36).

Surely this evidence justifies the award of which appellant complains, and we believe that it would have justified a much larger one.

CONCLUSION

In conclusion we remind the court that the United States is a party and we are mindful of paragraph 4 of Rule 27 relating to costs. In this connection we direct the court's attention to Section 743 of Title 46 U.S.C.A.

known as the Suits in Admiralty Act. The pertinent part of this section is as follows:

> "A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction."

This case was prosecuted pursuant to Section 1291 of Title 50 U.S.C.A. the Act of March 24, 1943, sometimes referred to as Public Law 17, the pertinent provisions of which provide as follows:

> "Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Sections 741-752)."

In *James Shewan & Sons Inc. v. United States,* 267 U.S. 86, 87; 45 S. Ct. 238, 239, Chief Justice Taft ordered the correction of a mandate in an action against the United States brought under the Suits in Admiralty Act, saying:

> "In accordance with this provision we *must* assess the costs of this appeal against the United States, and direct the District Court to assess also the costs of suit in that court and interest as that court shall order it in accordance with the statute." (Italics ours).

It is significant that appellant's counsel have cited no authorities whatsoever to support their position. We believe none can be found. They have misstated the evidence in an attempt to support an illogical argument. We are constrained to suggest that the appeal has delayed the proceedings on the judgment of the court below within the meaning of rule 26. We believe the judgment should be affirmed in all respects, and we further believe that we are entitled to costs and interest as provided by the Suits in Admiralty Act contrary to paragraph 4 of Rule 27 promulgated by this court.

Respectfully submitted,

K. C. TANNER,
TANNER & CLARK,
Proctors for Appellee.

No. 11584

United States
Circuit Court of Appeals
For the Ninth Circuit.

MITSUKIYO YOSHIMURA,

Appellant,

vs.

HENRY ROBINSON, Acting U. S. Collector of Internal Revenue,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii

Rotary Colorprint, 870 Brannan Street, San Francisco 6-4-47—60

No. 11584

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MITSUKIYO YOSHIMURA,

SHIRO KASHIWA,

209 Hawaiian Trust Building,
Honolulu, T. H.

For the Plaintiff.

HENRY ROBINSON,
Acting U. S. Collector of Internal Revenue,

RAY J. O'BRIEN,
U. S. District Attorney,

Federal Building,
Honolulu, T. H.,

For the Defendant. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
for the District of Hawaii

Civil No. 733

MITSUKIYO YOSHIMURA,

Plaintiff,

vs.

FRED H. KANNE,
U. S. Collector of Internal Revenue,

Defendant.

CLERK'S STATEMENT

Time of Commencing Suit: June 18, 1946. Complaint filed.

Names of Original Parties: Mitsukiyo Yoshimura, Plaintiff; Fred H. Kanne, Defendant.

Dates of Filing Pleadings:

1946

Aug. 8—Motion to Dismiss and Memorandum of Points and Authorities.

Dec. 10—Answer of Defendant.

1947

Jan. 16—Judgment.

Jan. 31—Order Sustaining Motion to Dismiss.

Proceedings in the above entitled matter were had before the Honorable J. Frank McLaughlin, Judge, United States District Court, District of Hawaii.

Dates of Filing Appeal Documents:

1947

Jan. 17—Notice of Appeal.

Jan. 27—Cost Bond.

Feb. 4—Statement of Points and Designation of Record. [2]

Feb. 10—Motion for Order Extending Time, Affidavit and Order.

Feb. 10—Amended Designation of Record.

CERTIFICATE OF CLERK TO THE ABOVE STATEMENT

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties, the dates when the respective pleadings were filed; the name of the judge presiding; and the dates when appeal pleadings were filed in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of March, A. D. 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk,

[Title of District Court and Cause.]

COMPLAINT

To the Honorable, the Presiding Judge of the District Court of the United States for the District of Hawaii:

Comes now Mitsukiyo Yoshimura, plaintiff above named, and alleges as follows:

I.

The ground upon which the jurisdiction of this court is involved and depends is as follows:

This is an action filed by the plaintiff for a permanent injunction pursuant to Section 24 of the Judicial Code as amended, U. S. C. Title 28, Section 41, Paragraphs 1 and 5, and to Rules 2 and 65 of the Federal Rules of Civil Procedure.

II.

Defendant Fred H. Kanne is and was at all times mentioned herein a resident and citizen of the Territory of Hawaii and a citizen of the United States of America and is and was at all times mentioned herein the duly appointed Collector of Internal Revenue within the Territory of Hawaii, and as such collector was and is empowered to collect any and all taxes [5] due to the United States Government from resident and citizens of the Territory of Hawaii including net income taxes due to the United States from residents of the Territory of Hawaii.

III.

Plaintiff Mitsukiyo Yoshimura is and was at all times mentioned herein a subject and citizen of the Empire of Japan and has been a resident of the Territory of Hawaii continuously for about 30 years next preceding the filing of this action.

IV.

Plaintiff has been continuously for the last 13 years and is now conducting a service station business on Kamehameha Highway at Waiau between Pearl City and Aiea of the City and County of Honolulu, Territory of Hawaii; said service station business has been his sole source of income during the entire said 13 years.

V.

Plaintiff has heretofore filed in compliance with the law his annual Federal net income tax returns and each such return represented his true net profits from the business and plaintiff has paid any and all taxes due on such returns.

VI.

On or about the latter part of the year 1944 or in early 1945, an investigator named Latti then hired and employed by the United States Government and assigned to the Bureau of Internal Revenue, Treasury Department, visited the business premises of the plaintiff at Waiau aforementioned and demanded that the plaintiff show and display to him the books of the plaintiff's said business for the years 1941, 1942 and 1943, and as a result of such request the plaintiff handed his books [6]

and records for the said years to the said investigator for examination.

VII.

That the said investigator looked over the said books and informed the plaintiff that the plaintiff had defrauded the United States Government of thousands of dollars in taxes, and that if the plaintiff did not sign a certain statement admitting fraud to be prepared by the said investigator, that the plaintiff being a subject of any enemy country would be in a very precarious position and that possibly plaintiff may be interned.

VIII.

That the plaintiff has had little education; that he has never fully mastered the English language; that the said Bureau of Internal Revenue through its agents never obtained a competent interpreter for him; that the legal effect of the signing of the said statement admitting fraud was never explained to him; that the word "fraud" was never defined to him; that at the said time Japanese alien residents of Hawaii were being interned and imprisoned in large number for unexplained reasons by a government headed by a "Military Governor"; that said interned alien residents were not tried before this court or any court of competent jurisdiction but were imprisoned and detained for many years under the authority of said Military Governor; that the plaintiff had heard of the summary internment processes of the "military government" of Japanese aliens; that plaintiff was in fear of

the powers of internment of the Military Governor; that plaintiff feared that the said investigator would cause the plaintiff to be interned; that plaintiff would not [7] have signed the said statement of fraud had there been no such threat of internment and had he fully comprehended the meaning of the fraud statement; that he did sign the said statement admitting income tax fraud but that it was not upon his free will; that the said fraud statement is in the possession of the Bureau of Internal Revenue.

IX.

That thereafter during the latter part of the year 1945 or in early 1946, investigators from the Bureau of Internal Revenue again visited the premises of the plaintiff and requested that plaintiff sign three forms called "Form 870", a copy of which is attached hereto, marked Exhibit "A", and reference to which is hereby made as if fully recited herein, waiving any and all restrictions on the assessment and collection of deficiency in taxes for the years 1941, 1942 and 1943.

X.

That the plaintiff told the said investigators that the plaintiff had consulted an attorney with relation to the Federal income tax matters for the said years and that the plaintiff had been advised to not sign any papers thereafter without the approval of the said attorney; that the plaintiff wanted to see said attorney before signing said papers and requested that he be permitted to see his attorney;

that said investigators said that an attorney was not necessary and that since plaintiff had signed the statement admitting fraud referred to in paragraphs 7 and 8 above that he was in a very dangerous position and cited the various examples of Federal income tax evaders who were imprisoned after conviction before the Federal District Court of Honolulu; that the plaintiff has been informed and alleges as a fact upon such information that at the said time said [8] investigators and their superiors well knew that the legal authorities in charge of prosecution of the plaintiff's case had gone over the criminal aspect of the plaintiff's case and had advised against prosecution in spite of the said written confession; that the threat of prosecution was used as a hammer to obtain the signature on the three waivers aforementioned; that the plaintiff did under the foregoing circumstances sign said waivers; that his signature was put on said waivers under compulsion and that it was not by his free will; that the said waiver form are now in the possession of the Bureau of Internal Revenue.

X.

That the plaintiff immediately after signing said waiver forms contacted his attorney and with his attorney went to the office of the investigators requesting that the said waiver forms be returned; that the investigator in charge of the office reported that it was too late because the waiver forms were mailed to Washington, D. C., and refused to give said waiver forms back; that plaintiff through

this attorney wrote to Washington to the Bureau of Internal Revenue there requesting a consideration of the matter but his request was refused.

XI.

That as a result of the signing of said forms the plaintiff on or about May 20, 1946, received from the defendant a tax bill for deficiencies and penalties for the following amounts:

Year	Deficiency	50 per cent Penalty
1941	$1,021.94	$ 510.97
1942	1,792.25	896.13
1943	3,510.81	1,755.41
Totals	$6,325.00	$3,162.51

XII.

That defendant in said tax bill demanded the immediate payment of the said total sum or else that he, the defendant, would seize and sell the properties of the plaintiff.

XIII.

That the plaintiff has not in his possession $9,487.51 in cash and/or in real and personal property to make payment and claim a refund, and if the defendant is permitted to seize and sell the properties of the plaintiff, the plaintiff would be irreparably damaged.

XIV.

That the land and building whereon plaintiff's service station is situated is not his own but it is rented by him on a month to month basis.

XV.

That the plaintiff has no adequate plain and complete remedy at law and he has no remedy under the appellate procedure provided for under the Internal Revenue laws and regulations.

XVI.

That the plaintiff cannot appeal from the said assessment made by the Bureau of Internal Revenue to the Tax Court and other higher tax tribunals because of the aforementioned waivers which he signed under the conditions aforestated.

Wherefore, Plaintiff demands that the court adjudge:

1. That the assessments aforementioned for the years 1941, 1942 and 1943 in the total sum of $9,487.51 be vacated.

2. That the defendant be permanently enjoined from collecting said taxes for the years 1941, 1942 and 1943 in the sum of $9,487.51 from the plaintiff.

3. That the plaintiff be granted whatever other relief which is just and equitable. [10]

Dated at Honolulu, T. H., this 13th day of June, A.D. 1946.

/s/ MITSUKIYO YOSHIMURA,
Plaintiff.

/s/ SHIRO KASHIWA,
Attorney for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Mitsukiyo Yoshimura, being first duly sworn on oath, deposes and says: That he is the plaintiff herein; that he has read the foregoing Complaint, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ MITSUKIYO YOSHIMURA.

Subscribed and sworn to before me this 13th day of June, A.D. 1946.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires August 9, 1947. [11]

EXHIBIT "A"

Form 870
Treasury Department
Internal Revenue Service
(Revised June 1941)

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

(Date Received)

Pursuant to the provisions of section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby

waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
(declared value) excess-profits
tax in the sum of $.....
taxable year ended.....
excess profits tax in the sum of $.....
taxable year ended.....
in the sum of $.....

amounting to the total sum of $.....

together with interest thereon as provided by law.

.....
(Taxpayer)

.....
(Taxpayer)

.....
(Address)

By.....

Date .....

Note.—The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as in-

dicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed. [12]

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Shiro Kashiwa, plaintiff's attorney, whose address is 209 Hawaiian Trust Building, Honolulu 48, Territory of Hawaii, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judg-

ment by default will be taken against you for the relief demanded in the complaint.

Date: June 18, 1946.

/s/ WM. F. THOMPSON, JR.,
Clerk of Court. [13]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 18th day of June, A.D. 1946, I received the within summons and the same is returned duly executed by exhibiting the Original Summons to Fred H. Kanne, U. S. Collector of Internal Revenue, Honolulu, T. H., and by handing to and leaving with him a certified copy of the Original Summons and a certified copy of the Complaint attached thereto.

Dated at Honolulu, T. H., this 18th day of June, A.D. 1946.

OTTO F. HEINE,
U. S. Marshal,
District of Hawaii.

By /s/ GEORGE E. BRUNS,
Deputy.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Fred H. Kanne, United States Collector of Internal Revenue, by Ray J. O'Brien, United States Attorney for the District

of Hawaii, and move the Court to dismiss the complaint upon the following grounds:

(1) That the Court is without jurisdiction of the subject matter of this suit for the reason that it affirmatively appears on the face of the complaint that the instant proceeding is a suit to enjoin the collection of a Federal tax.

(2) That the complaint fails to state a claim upon which equitable relief can be granted.

(3) That it affirmatively appears on the face of the complaint that the defendant, Fred H. Kanne, is the United States Collector of Internal Revenue for the District of Hawaii, an agent and official of the United States of America of the Treasury Department, [15] Bureau of Internal Revenue, and that therefore the United States of America is the real party in interest in these proceedings and may not be sued without its consent.

Dated: Honolulu, T. H., this 8th day of August, 1946.

FRED H. KANNE,
U. S. Collector of
Internal Revenue.

By RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ EDWARD A. TOWSE,
Assistant United States
Attorney, District
of Hawaii,
Attorney for Defendant.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

Section 3653 of the Internal Revenue Code (26 U.S.C.A. 3653) by its terms expressly prohibits suits to restrain the assessment or collection of any tax:

> "§3653. Prohibition of suits to restrain assessment or collection.
>
> (a) Tax. Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The inhibition of this section applies to all assessments of taxes, legal or illegal made under color of their offices by Internal Revenue officers charged with the general jurisdiction of the subject of assessing taxes.

Snyder v. Marks, 109 U. S. 189;

Dodge v. Osborn, 240 U. S. 118;

Pittsburg, etc. R. Co. v. Board of Public Works, 172 U. S. 32;

Pacific Steam Whaling Company v. U. S., 187 U. S. 447.

Enforcement of a jeopardy assessment may not be enjoined.

Salikoff v. McCaughin, 24 F. 2d 434.

Imposition of heavy fines or penalties is insufficient to envoke equitable aid to restrain collection of tax. Equity [17] will not enjoin collection of tax because of financial inability to pay it.

Woner v. Lewis, 13 Fed. Supp. 45;

Danahy Packing Co. v. McGowan, 11 Fed. Supp. 920.

The complaint herein affirmatively alleges that the defendant, Fred H. Kanne, is and was at all times mentioned in the complaint the duly appointed collector of Internal Revenue within the District of Hawaii empowered to collect any and all taxes due to the United States of America from residents and citizens of the Territory of Hawaii including net income taxes due to the United States of America from residents of the Territory. That the defendant, in that capacity, is an agent and officer of the United States of America, is too well established to require the citation of authority in support thereof.

An action or proceeding will not lie against the United States of America for the misfeasance or nonfeasance of its officers or agents.

Givens v. United States, 8 Wall. 269, 274;

Russell v. United States, 182 U. S. 516, 530;

Peabody v. United States, 231 U. S. 530, 539.

Dated: Honolulu, T. H., this 8th day of August, 1946.

Respectfully submitted,

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ EDWARD A. TOWSE,
Assistant United
States Attorney,
District of Hawaii. [18]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes now Ray J. O'Brien, United States Attorney for the District of Hawaii and for answer to the Bill of Complaint of the plaintiff in the above entitled cause and on behalf of the defendant above named says:

I.

In answer to the allegations of the paragraphs numbered "I to V" inclusive of the Bill of Complaint alleges, admits, denies and by way of answer thereto says:

1.

Answering paragraph I of the complaint, defendant denies that this Honorable Court has jurisdiction of the subject matter of the Bill of Complaint.

2.

Admits the allegation of paragraph II of the Complaint.

3.

Defendant lacks sufficient knowledge to form a belief as to paragraph III of the Bill, and leaves the plaintiff to proof thereof. [20]

4.

Defendant lacks sufficient knowledge to form a belief as to paragraph IV of the Bill and leaves the plaintiff to proof thereof.

5.

As to the matters alleged in paragraph V of the Bill of Complaint, the defendant considers such matters are immaterial to this cause; but if considered material and placed in issue, denies each and every allegation thereof as the same pertains to the taxable years 1941, 1942 and 1943.

6.

As to the matters alleged in paragraph VI of the Bill of Complaint, the defendant considers such matters are immaterial to this cause; but if considered material and placed in issue admits, denies and alleges as follows:

Admits that Investigators of the Bureau of Internal Revenue, Treasury Department, at various times prior to the filing of the Bill of Complaint herein visited the premises then occupied by the plaintiff at Waiau, Island of Oahu.

Denies that the said Internal Revenue agents demanded that the plaintiff show and display to them the books of the plaintiff's business for the years 1941, 1942, and 1943.

Alleges that the plaintiff did, pursuant to lawful authority thereunto delegated to the said agents, voluntarily tender his incomplete business books and records for the said years to the investigators upon their request and for the purpose of examination.

7.

Answering paragraph VII of the Bill of Complaint admits that the Investigators looked over and examined the said incomplete books and records.

Denies that the investigators or any of them informed the plaintiff that if he did not sign a certain statement admitting fraud, to be prepared by the said investigators, that the plaintiff being a subject of an enemy country would be in a very precarious position and that possibly plaintiff may be interned.

8.

Answering paragraph VIII of the Bill of Complaint defendant admits and denies as follows:

Defendant has no knowledge upon which to form a belief as to whether or not the plaintiff has had little education, and leaves the plaintiff to proof thereof.

Defendant has no knowledge upon which to form a belief as to whether or not the plaintiff has ever fully mastered the English language but alleges that the plaintiff does possess a sufficient working knowledge of the English language to enable him to conduct a sizeable business within an American community and possesses sufficient knowledge thereof to enable him to conduct his business and maintain

the books and records thereof in the English language.

Denies that the Bureau of Internal Revenue through its agents were requested to obtain a competent interpreter for the plaintiff; and in this connection alleges that the plaintiff did not request that an interpreter be provided for him and that any discussion had with the plaintiff was conducted in the English language which the plaintiff understood.

Denies that the legal effect of the signing of the said statement admitting a fraud was never explained to him; and in this connection alleges that the legal effect was in fact fully and completely explained to the plaintiff prior to the signing thereof.

Denies that the word "fraud" was never explained to the plaintiff; and in this connection alleges that the legal effect and import of whatever action the plaintiff would take in the premises was fully and thoroughly explained to him prior to the signing thereof.

Admits that insofar as defendant's knowledge based upon information and belief of the then existing government was concerned, that persons of Japanese descent who were residents of the Territory of Hawaii were being interned and imprisoned, in what numbers and for what precise reasons being to the defendant unknown.

Defendant has no knowledge upon which to base a belief as to whether or not interned alien residents were tried before this Court or any court of competent jurisdiction or were imprisoned and de-

tained for many years under the authority of a military governor.

Defendant has no knowledge as to whether or not the plaintiff had heard of the summary internment processes of the "military government" as to Japanese aliens.

Defendant has no knowledge as to whether or not plaintiff was in fear of the powers of internment of the military governor.

Defendant denies that the said Investigators caused the plaintiff to fear that he would be interned.

Defendant has no knowledge as to whether or not plaintiff would not have signed the said statement of fraud had there been no such threat of internment and had he fully comprehended the meaning of the fraud statement; and in this connection specifically denies that any threats of interment or lack of comprehension of the meaning of the fraud statement was practiced or imposed upon the plaintiff. [23]

Admits that the plaintiff did sign a statement admitting income tax fraud, but denies that the said statement is material to this cause; and if the said statement be material to this cause alleges that it was signed as the free act, will and deed of the said plaintiff.

Alleges that the said fraud statement is immaterial to this cause for the reason that any "fraud statement" so voluntarily tendered to the Bureau of Internal Revenue, Treasury Department, by the plaintiff, constitutes a portion of an official report

of the Bureau of Internal Revenue, Treasury Department, relative to an investigation for criminal responsibility, and as such is immaterial to this civil proceeding; and for the further reason that the limitation of action upon criminal prosecution as to the plaintiff for the alleged fraud is for a period of six years, which six years have not expired on the date hereof.

Further answering paragraph VIII of the Complaint the defendant alleges that this Honorable Court will judicially note that the Internal Revenue Statutes and Regulations were at no time during the period in the Complaint set forth suspended or terminated as they pertained to lawful payment of individual income taxes due to the United States.

9.

Answering paragraph IX of the Complaint defendant admits that prior to the filing of the Bill of Complaint duly authorized investigators of the Bureau of Internal Revenue, Treasury Department, visited the then premises of the plaintiff and pursuant to law, and in that respect duly authorized and upon identifying themselves and explaining the purpose of their visit did request that the plaintiff sign the said "Form 870." [24]

10.

Answering paragraph X of the Complaint, admits that the plaintiff told the said Investigators that he did have an attorney; and in this connection alleges that the plaintiff was invited to forthwith

proceed to a conference with the said attorney, which offer was declined by the plaintiff.

Defendant has no knowledge as to whether or not the plaintiff had been informed that the legal authorities in charge of prosecution of the plaintiff's case had gone over the criminal aspect of the plaintiff's case and had advised against prosecution in spite of the said written confession; and in this connection denies that the foregoing is material to this cause, but if it be considered material defendant alleges that the determination to be made as to the institution of criminal proceedings relative to the plaintiff is an official function of the appropriate agency of the United States in charge thereof and that the six years period of time within which said criminal proceedings against the plaintiff may be instituted has not expired on the date hereof.

Denies that any threats of prosecution were used as a hammer to obtain the signature on the waivers.

Denies that the plaintiff signed the said waivers under the circumstances recited in paragraph IX.

Denies that the plaintiff's signature was placed on the said waivers under compulsion and not by his free will.

10.

Answering paragraph X of the Bill of Complaint defendant admits that the plaintiff appeared, together with his attorney, at the office of the investigators, and requested that the said waivers forms be returned; but denies that the plaintiff made

the said request immediately after the signing of the said waiver forms. [25]

Admits that the investigator in charge of the said office reported that the said waiver forms had been mailed to Washington, D. C.; and in this connection admits that the said investigators in charge could not return the said waivers for this reason.

The defendant has no knowledge as to whether or not the plaintiff through his attorney wrote to Washington to the Bureau of Internal Revenue and requested consideration of the matter and that said request was refused.

11.

Answering paragraph XI of the Bill of Complaint the defendant admits that, according to law, the plaintiff was duly tendered a tax bill for deficiencies and penalties in the amounts alleged in paragraph XI of the Complaint.

12.

Plaintiff admits that the said tax bill, according to law and by its terms, demanded the payment of the said total sum, or in lieu thereof seizure and sale of the properties of the plaintiff other than those properties exempted by law.

13.

Answering paragraph XIII of the Complaint defendant has no knowledge as to whether or not plaintiff, on the date hereof, has the sum of $9487.51 in his possession in cash and/or in real or personal property by which to make payment and claim a refund; and in this connection alleges that the finan-

cial inability of the plaintiff in itself to meet the said tax bill is insufficent in law to justify the assumpton of jurisdiction of these proceedings by this Honorable Court; and for the further reason that the plaintiff fails to allege in his said Bill of Complaint any measure of hardship, the exhaustion of available administrative remedies under the laws of the United States, the exhaustion of remedies as law, the illegality or unconstitutionality of the tax in question, or any extraordinary and exceptional [26] circumstances as the basis of the jurisdiction of this Honorable Court of these proceedings. Defendant denies that the seizure and sale of such properties of the plaintiff, according to law, save and except those properties exempt by law from such seizure and sale would result in irreparable damage to the plaintiff.

14.

Answering paragraph XIV of the Bill of Complaint the defendant states upon information and belief that the land and buildings whereon plaintiff's former service station business was situate was rented by him.

15.

Answering paragraph XV of the Bill of Complaint the defendant denies that the plaintiff has no plain, adequate and complete remedy at law and denies that he has no remedy under the appellate procedure available to him under the Internal Revenue laws and regulations; and in this connection alleges that the plaintiff in the premises, has, in the alter-

native, five plain, adequate and complete remedies, to wit:

1. Administrative appeal to the Treasury Department.

2. The payment of the amount of tax due under the tax bill.

3. Action at law against the Collector of Internal Revenue for the District of Hawaii to recover the amount so assessed and paid, (under alternative "2" supra).

4. By offer in compromise submitted to the Treasury Department in full discharge of the entire amount claimed under the tax bill and based upon the plaintiff's financial ability to pay an amount offered in compromise less than the full amount, which, after examination of the plaintiff's assets and acceptance [27] by the said Treasury Department would, if accepted, be in full settlement and discharge of the total amount of the said tax bill.

5. By consent and approval of the Collector of Internal Revenue of the District of Hawaii to the payment in installments not to exceed the period of six years of the amount set forth in the tax bill; all of the foregoing remedies and relief available to the plaintiff herein being according to law and the statutes and regulations of the Bureau of Internal Revenue, Treasury Department, United States of America.

16.

Answering paragraph XVI of the Bill of Complaint defendant admits that, according to law, the execution of the said waivers (Form 870) precludes recourse to the United States Tax Court; and in this connection reiterates and denies that the said waivers were executed under the conditions and circumstances alleged in the Bill of Complaint.

17.

Defendant denies each and every allegation in the Bill of Complaint not herein admitted, controverted or specifically denied.

II.

For a second, further, separate and distinct defense to the said Bill of Complaint the defendant says:

1.

That at Honolulu, on the 14th day of August, 1946, the plaintiff voluntarily executed a declaration and statement of his, the said plaintiff's net worth, in affidavit form, a true, full and complete copy of which is annexed hereto marked "Exhibit A," and incorporated herein by reference; which said affidavit declares that the said plaintiff did quit his business of conducting a service station at the end of August, 1946, and is no longer engaged in said service station business. [28]

2.

That by reason of the foregoing there exists no extraordinary or exceptional circumstances as a matter of law which may be invoked as the basis of the jurisdiction of the Court herein.

III.

For a third, further, separate and distinct defense to the said Bill of Complaint the defendant alleges:

1.

That by virtue of the plaintiff's termination of his business at the end of August, 1946, as aforesaid, the plaintiff cannot, as a matter of law, suffer irreparable damages in the premises having voluntarily abandoned his sole source of income.

IV.

For a separate and distinct defense in points of law arising upon the face of the Bill of Complaint herein the defendant alleges that the facts alleged in the said Bill of Complaint are insufficient to constitute a valid cause of action in equity upon the following grounds:

1.

That the Court is without jurisdiction of the subject matter of the suit for the reason that it affirmatively appears that the instant proceeding is a suit to enjoin the collection of a federal tax which suit is prohibited by law.

2.

That the Complaint fails to state a claim upon which equitable relief can be granted.

3.

That the nature of the tax is one upon income, and the plaintiff fails to attack or contest the legality of the tax as such. [29]

4.

That the nature of the tax is one upon income, and the plaintiff does not attack, challenge, or question the constitutionality of the tax as such.

Wherefore the defendant prays that the said Bill of Complaint be dismissed and that the plaintiff be denied his relief sought herein or any other relief by way of temporary or preliminary injunction restraining order or permanent injunction.

Dated at Honolulu, T. H., this 9th day of December, A.D., 1946.

/s/ FRED H. KANNE,
Defendant, Collector of Internal Revenue, District of Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

Fred H. Kanne, being first duly sworn on Oath deposes and says: That he is the defendant herein; that he has read the foregoing Answer, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this 9th day of December, A.D. 1946.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States District Court, District of Hawaii. [30]

EXHIBIT "A"

Affidavit of Net Worth

Territory of Hawaii,
City and County of Honolulu—ss.

Mitsukiyo Yoshimura, being first duly sworn, on oath deposes and says:

That the following statement is my net worth:

Bank of Hawaii, Waipahu Branch	$ 444.44
Savings account, same bank	40.00
Cash on hand	1,028.00
Accounts receivable	385.00
Notes receivable	250.00
(payor just got out of Leahi Home)	
Land and building at Aiea—net worth	3,000.00
(Purchased for $6,000.00, of which $3,000.00 borrowed from Bert Yoshimura, a brother, on April 27, 1946.) I bought this for my home.	

No liabilities, except the $3,000.00 to Bert Yoshimura.

Note: Quit business at end of August, 1946, because Government is fixing road in front of service station and there isn't any more business. Rent of $150.00 per month can't be met. The service station must be raised to meet the new road level or else there will be no business. If raised by landlord, he says rent will be $200.00 per month.

that this statement is made to the United States Collector of Internal Revenue to show my net worth

as of October 14, 1946; and further affiant sayeth not.

/s/ MITSUKIYO YOSHIMURA

Subscribed and sworn to before me this 14th day of October, A. D. 1946.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires August 9, 1947. [31]

In the United States District Court for the Territory of Hawaii

April Term 1946

Civil No. 733

MITSUKIYO YOSHIMURA,

Plaintiff,

vs.

FRED H. KANNE, U. S. Collector of Internal Revenue,

Defendant.

JUDGMENT

Pursuant to the oral order of dismissal of this Court upon the defendant's motion to dismiss at the end of the plaintiff's presentation of his evidence in this case,

It Is Hereby Adjudged and judgment be and is hereby entered for the defendant and against the plaintiff in the above entitled cause and court.

Dated at Honolulu, T. H., this 16 day of January, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge of the above entitled Court.

Approved as to form:

FRED H. KANNE,
U. S. Collector of Internal Revenue,
Plaintiff,

By /s/ EDWARD A. TOWSE,
Assistant United States Attorney,
Attorney for Defendant.

MITSUKIYO YOSHIMURA,
Plaintiff,

By /s/ SHIRO KASHIWA,
Attorney for Plaintiff. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mitsukiyo Yoshimura, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of January, 1947.

Dated at Honolulu, T. H., this 17th day of January, 1947.

MITSUKIYO YOSHIMURA,
Plaintiff,
By /s/ SHIRO KASHIWA,
Attorney for Appellant. [35]

[Title of District Court and Cause.]

COST BOND

Know All Men By These Presents:

That I, Mitsukiyo Yoshimura, as principal, and Melville G. Uechi and Richard K. Yamada, as sureties, are held and firmly bound unto Henry Robinson, Acting U. S. Collector of Internal Revenue, Defendant substituted, in the sum of Two Hundred Fifty and No/100 Dollars ($250.00); to which payment well and truly to be made we bind ourselves and our respective heirs, executors, administrators and assigns, jointly and severally, by these presents.

Signed and sealed with our seals and dated this 24th day of January, 1947.

Whereas, Mitsukiyo Yoshimura, Plaintiff above named, has prosecuted his appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in this cause by the United States District Court for the Territory of Hawaii on the 16th day of January, 1947;

Now, Therefore, the condition of this obligation

is such that if the above named Plaintiff, principal herein, shall prosecute [37] his appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] /s/ MITSUKIYO YOSHIMURA,
Principal
[Seal] /s/ MELVILLE G. UECHI,
[Seal] /s/ RICHARD K. YAMADA,
Sureties.

Territory of Hawaii,
City and County of Honolulu—ss.

Melville G. Uechi and Richard K. Yamada, each being first duly sworn, on oath, deposes and says:

That he is a surety on the foregoing cost bond; that he is a citizen of the United States of America; that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; that he is over 21 years of age; that he is not under guardianship; nor is he restrained or prevented from dealing with his property by any legal proceedings; that he is the owner of unencumbered property situated in the Territory of Hawaii aforesaid which is subject to execution and worth more than double the amount of the penalty specified in the foregoing bond, over and above all debts, liabilities and obligations.

/s/ MELVILLE G. UECHI,
/s/ RICHARD K. YAMADA.

Subscribed and sworn to before me this 24th day of January, A. D. 1947.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires Aug. 9, 1947.

Approved as to form and sufficiency of sureties:

/s/ EDWARD A. TOWSE,
Assistant United States Attorney,
Attorney for Defendant.
/s/ J. FRANK McLAUGHLIN,
Judge of the above entitled Court. [38]

[Title of District Court and Cause.]

ORDER SUSTAINING MOTION TO DISMISS

This suit was brought to enjoin the Collector from collecting from the Plaintiff income taxes for the years 1941, 1942, and 1943 in the total sum of Six Thousand Three Hundred Twenty-five Dollars ($6,325.00) representing deficiencies for those years, plus a 50% penalty for the same years of Three Thousand One Hundred Sixty-two and 51/100 Dollars ($3,162.51).

At the outset, the Defendant moved to dismiss the complaint on points of law. The Court overruled the Motion on the ground that taking the facts well pleaded as true, it appeared that the Plaintiff had stated a case within the judicial ex-

ception to the statutory prohibition against the enjoining of the collection of taxes, 26 U.S.C. Sec. 3653, for it was alleged:

1. That Plaintiff was a subject of Japan, poorly educated, who spoke barely sufficient English to operate his gasoline filling station —his sole source of income.

2. That he had filed true tax returns for the years in question and paid his taxes. [40]

3. That a representative of the Intelligence Unit of the Treasury Department visited him in 1944 and while looking over his books indicated to Plaintiff that he had defrauded the government and that being an alien he was in a dangerous position and might be interned by the Army.

4. That being in fear of internment by the Army and, though not understanding the meaning of the word "fraud," Plaintiff signed a statement for the investigator admitting fraud.

5. That thereafter, late in 1945 or early 1946, representatives of the Treasury Department again called upon Plaintiff and asked him to sign in blank a Form 870; that he declined to sign it until he consulted his lawyer, but that the Treasury men persuaded him that such was not necessary and that since he had signed a fraud statement he should sign the Form 870 or he might be criminally prosecuted and imprisoned by the Federal Court as others recently had been; so Plaintiff signed the form.

6. That he thereafter consulted his lawyer,

who in turn asked for the return of the signed in blank Form 870 but was refused by the Treasury Department.

7. And, finally, that the Plaintiff does not have Nine Thousand Four Hundred Eighty-seven and 51/100 Dollars ($9.487.51) and that if Defendant seizes and sells what little property Plaintiff has, he will be unjustly and irreparably damaged for he has no remedy at law and is denied access to the Tax Appeal Court, having signed the Form 870.

In view of these astounding allegations, especially those as to threatened internment by the Army, forceful persuasion to obtain a signature to a blank Form 870 while knowing the Plaintiff had a lawyer, and the threat that this Court would imprison Plaintiff as a tax evader if he didn't sign the Form 870, the [41] Court decided it appeared to be a case within the exception to the statute and would hear the evidence.

Accordingly, the parties proceed to trial. At the conclusion of the Plaintiff's case, the Defendant renewed his Motion to Dismiss on the ground that regardless of that shown by the evidence, in point of law, Plaintiff could not obtain the relief prayed for.

As against the Motion, giving the Plaintiff's evidence its best possible interpretation—and it was not too clear or satisfying—and assuming that Plaintiff had portrayed in a sufficient manner "exceptional circumstances" the Court—despite the fact that its sympathies were, upon the showing,

with the Plaintiff due to the shabby way he had been treated by the government's representatives—sustained the government's renewed Motion to Dismiss.

FINDINGS OF FACT

Viewed as against the Motion, I find that the Plaintiff's evidence at least sufficiently supports the allegation of the Complaint (above outlined) to require the government to go forward unless as a matter of law, Plaintiff could not obtain the relief prayed for.

CONCLUSIONS OF LAW

The law being that to come within the judicial exception to 26 U.S.C. Section 3653, it is necessary to show not only "exceptional circumstances" but also that the tax law is either unconstitutional or invalid as applied to Plaintiff—and the Plaintiff failing to show either that the income tax law was unconstitutional or that it was invalid as applied to him—I conclude that

As a matter of law, proof of exceptional circumstances alone are not enough to warrant the granting of the relief prayed for—to wit—an injunction to prevent the collection of assumed deficiency tax and the penalty. [42]

This written decision—conforming as it does to the Court's oral ruling—may be filed as of the date of the ruling sustaining the Motion to Dismiss.

Dated at Honolulu, Territory of Hawaii, January 31, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in granting, after plaintiff rested his case, defendant's motion to dismiss on the ground that the Court had no jurisdiction of the cause.

2. The Court erred in granting, after the plaintiff rested his case, defendant's motion on the ground that the plaintiff's evidence was not sufficient to grant relief as prayed for by the plaintiff.

Dated at Honolulu, T. H., this 4th day of Feb., A. D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff,
By /s/ SHIRO KASHIWA,
His Attorney. [45]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action.

1. Complaint and the attached Exhibit "A".
2. Summons and Officer's Return on Service of Writ.
3. Motion to Dismiss and Memorandum of Points and Authorities.
4. Answer and the attached Exhibit "A".
5. Entire transcript of evidence.
6. Following exhibits in evidence.
   (a) Plaintiff's Exhibit "A-1".
   (b) Plaintiff's Exhibit "A-2".
   (c) Plaintiff's Exhibit "A-3".
   (d) Plaintiff's Exhibit "B".
   (e) Plaintiff's Exhibit "C".
   (f) Plaintiff's Exhibit "D".
   (g) Plaintiff's Exhibit "E".
   (h) Plaintiff's Exhibit "F". [46]
7. Order Sustaining Motion to Dismiss.
8. Judgment.
9. Notice of Appeal.
10. Statement of Points.
11. Designation of Record.

Dated at Honolulu, T. H., this 4th day of February, A. D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff.
By /s/ SHIRO KASHIWA,
His Attorney. [47]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME

Comes now Mitsukiyo Yoshimura, plaintiff-appellant above named, by Shiro Kashiwa, his attorney, and shows the Court:

1. That on January 16, 1947, judgment was entered and filed in the above entitled cause.

2. That on January 17, 1947, a Notice of Appeal was filed in said cause.

3. That shortly thereafter counsel for plaintiff-appellant orally requested the reporter of the above entitled Court to prepare a transcript of the proceedings had in said cause and that on January 27, 1947, a written order for such transcript was filed in said Court and a copy thereof personally served on said reporter.

4. That said reporter will be unable to complete said transcript until sometime during the first week of March, 1947, due to pressure of his other duties

Wherefore, plaintiff-appellant, by his counsel moves this Honorable Court to issue an order extending the time for filing the record on appeal

with and docketing the action in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause until April 16, 1947.

This motion is based upon the records of the above entitled cause and upon the affidavit of Albert Grain, the reporter of the above entitled Court, hereto attached.

Dated at Honolulu, T. H., this 8th day of February A. D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant.
By /s/ SHIRO KASHIWA,
His Attorney.

The foregoing motion is approved on this 10th day of February A. D. 1947.

/s/ EDWARD A. TOWSE,
Assistant United States
Attorney,
Attorney for Defendant-
Appellee. [50]

[Title of District Court and Cause.]

AFFIDAVIT

Albert Grain, being first duly sworn, on oath deposes and says:

That he is a reporter of the above entitled Court; that between January 16 and January 23, 1947, Shiro Kashiwa orally requested him to prepare

a transcript of the proceedings had in the above entitled cause; and that on or about January 27, 1947, a copy of a written order for such transcript was personally served on him.

Your affiant further says on oath that due to pressure of his other duties he will be unable to complete said transcript until the first week of March, 1947.

Further your affiant sayeth not.

Dated at Honolulu, T. H., this 8th day of February, A. D. 1947.

/s/ ALBERT GRAIN.

Subscribed and sworn to before me this 8th day of February, A. D. 1947.

[Seal] /s/ ABRAHAM W. AKANA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires 6/30/49. [51]

[Title of District Court and Cause.]

ORDER

The motion of Mitsukiyo Yoshimura, plaintiff-appellant above named, by Shiro Kashiwa, his attorney, for an order extending the time for filing the record on appeal with and docketing the action in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, com-

ing before the Court and it appearing by the records of said cause that a judgment was entered and filed on January 16, 1947, and that a Notice of Appeal was filed on January 17, 1947, and upon the strength of the affidavit of Albert Grain, reporter of the above entitled Court, attached to said motion;

It Is Hereby Ordered that the plaintiff-appellant may have until April 16, 1947, to file his record on appeal with and docket his action in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause.

Dated at Honolulu, T. H., this 10th day of February, A. D. 1947.

/s/ J. FRANK McLAUGHLIN,
Judge of the above entitled Court.

Approved:

/s/ EDWARD A. TOWSE,
Assistant United States Attorney,
Attorney for Defendant-Appellee. [52]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD

Plaintiff-Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint and the attached Exhibit "A".
2. Summons and Officer's Return on Service of Writ.
3. Motion to Dismiss and the Memorandum of Points and Authorities.
4. Answer and the attached Exhibit "A".
5. Entire transcript of evidence.
6. Following exhibits in evidence:
   (a) Plaintiff's Exhibit "A-1".
   (b) Plaintiff's Exhibit "A-2".
   (c) Plaintiff's Exhibit "A-3".
   (d) Plaintiff's Exhibit "B".
   (e) Plaintiff's Exhibit "C".
   (f) Plaintiff's Exhibit "D".
   (g) Plaintiff's Exhibit "E".
   (h) Plaintiff's Exhibit "F". [54]
7. Order Sustaining Motion to Dismiss.
8. Judgment.
9. Notice of Appeal.
10. Cost Bond.
11. Motion for an Order Extending Time, Affidavit and Order.
12. Statement of Points.
13. Amended Designation of Record.

Dated at Honolulu, T. H., this 8th day of February, A. D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant.
By /s/ SHIRO KASHIWA,
His Attorney. [55]

[Title of District Court and Cause.]

From the Minutes of the United States District Court for the District of Hawaii

Monday, December 16, 1946

On this day came the plaintiff herein with Mr. Shiro Kashiwa, his counsel, and also came Mr. Edward A. Towse, Assistant United States District Attorney, counsel for the defendant herein. This case was called for hearing.

Motion to dismiss was renewed by Mr. Towse, and was denied by the Court.

Oral motion by Mr. Towse for judgment in favor of the respondent herein was denied by the Court.

Copy of Form 21-A, Second Notice and Demand for Income Tax, for the year 1941, was admitted in evidence as Plaintiff's Exhibit "A-1," marked and ordered filed.

Copy of Form 21-A, Second Notice and Demand for Income Tax, for the year 1942, was admitted in evidence as Plaintiff's Exhibit "A-2," marked and ordered filed.

Copy of Form 21-A, Second Notice and Demand for Income Tax, for the year 1943, was admitted in evidence as Plaintiff's Exhibit "A-3," marked and ordered filed.

Mr. Mitsukiyo Yoshimura, plaintiff herein, was called and sworn and testified on his own behalf.

Bookkeeping sheet was admitted in evidence over the objections of Mr. Towse as Plaintiff's Exhibit "B," marked and ordered filed.

Memorandum of the address of H. Irey was admitted in evidence [56] as Plaintiff's Exhibit "C," marked and ordered filed.

At 3:30 p.m., the Court ordered that this case be continued to December 17, 1946, at 1:30 p.m. for further hearing. [57]

[Title of District Court and Cause.]

From the Minutes of the United States District Court for the District of Hawaii

Wednesday, December 18, 1946

On this day came the plaintiff herein with Mr. Shiro Kashiwa, his counsel, and also came Mr. Edward A. Towse, Assistant United States District Attorney, counsel for the defendant herein. This case was called for further hearing.

Mr. Yoshimura resumed the witness stand and testified further.

Copy of Affidavit of Net Worth executed by the plaintiff herein was admitted in evidence as Plaintiff's Exhibit "D," marked and ordered filed.

Mr. Kashiwa took the witness stand and testified in this case.

Letter, dated May 20, 1946, Treasury Department, Washington, D. C., to Mr. Mitsukiyo Yoshimura, was admitted in evidence as Plaintiff's Exhibit "E," marked and ordered filed.

At 3:00 p.m., the plaintiff rested his case.

Motion for dismissal was made by Mr. Towse.

At 3:05 p.m., leave having been granted by the Court to reopen plaintiff's case, a copy of Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax was admitted in evidence as Plaintiff's Exhibit "F," marked and ordered filed.

Argument was then had by respective counsel on the motion to dismiss.

At 3:50 p.m., the Court ordered that this case be continued to Thursday, December 19, 1946, at 2 p.m. for further hearing. [58]

[Title of District Court and Cause.]

From the Minutes of the United States District Court for the District of Hawaii

Thursday, December 19, 1946

On this day came the plaintiff herein with Mr. Shiro Kashiwa, his counsel, and also came Mr. Edward A. Towse, Assistant United States District Attorney, counsel for the defendant herein. This case was called for further hearing.

Following further argument by respective counsel, motion to dismiss was granted by the Court.

Exceptions were noted by Mr. Kashiwa to the Court's ruling. [59]

[Title of District Court and Cause.]

From the Minutes of the United States District Court for the District of Hawaii

Thursday, January 16, 1947

On this day came Mr. Shiro Kashiwa, counsel for the plaintiff herein, and also came Mr. Edward A. Towse, Assistant United States District Attorney, counsel for the defendant herein.

The matter of appeal, amount of bond pending appeal, and proper steps to be taken on appeal were discussed before the Court.

Form of Judgment was presented to the Court, signed, and ordered to be placed on file. [60]

[Title of District Court and Cause.]

From the Minutes of the United States District Court for the District of Hawaii

Friday, January 17, 1947

On this day came Mr. Edward A. Towse, Assistant United States District Attorney, and also came Mr. Shiro Kashiwa, counsel for the plaintiff herein. This case was called for hearing on motion to stay collection of taxes during pendency of the appeal and for setting amount of bond as required under Rules of Civil Procedure.

Following argument by respective counsel, the Court ordered that bond as required by Section 62(c) of the Rules of Civil Procedure for the District Courts of the United States be waived.

The Court further ordered that during pendency of the appeal in this cause, the plaintiff, with a written consent of his wife, deposit with the clerk of court, Certificate of Title No. 35,165 issued by the Land Court of the Territory of Hawaii, and that the Collector of Internal Revenue be enjoined and prohibited from collecting the taxes as assessed during said pendency. Orders to that effect to be signed upon presentation. [61]

In the United States District Court for the Territory of Hawaii

Civil No. 733

MITSUKIYO YOSHIMURA,

Plaintiff,

vs.

FRED H. KANNE, U. S. Collector of Internal Revenue,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on December 16, 1946, at 2:00 o'clock p.m.,

Before

Hon. J. Frank McLaughlin, Judge.

Appearances:

Shiro Kashiwa, Esq.,
Appearing for the Plaintiff;

Ray J. O'Brien, Esq.,
United States Attorney, District of Hawaii, appearing for the Defendant;

Edward A. Towse, Esq.,
Assistant United States Attorney, District of Hawaii, appearing for the Defendant.

PROCEEDINGS

The Clerk: Civil No. 733, Mitsukiyo Yoshimura versus Fred H. Kanne, U. S. Collector of Internal Revenue, for hearing.

Mr. Towse: Ready for the Defendant, Collector of Internal Revenue.

Mr. Kashiwa: Ready for the Plaintiff, your Honor.

The Court: Very well. Before we begin, let me inquire of you gentlemen as to the length of time you think this will take to try; and, though it has been scheduled for afternoon sessions, in view of the fact that until Friday mornings will be available, whether or not beginning tomorrow you would like any morning sessions.

Mr. Kashiwa: I have a jury case in the morning sessions.

The Court: All right.

Mr. Towse: If the Court please, prior to proceeding at this time I have two motions to make on behalf of the Defendant, Collector of Internal Revenue. First, the Defendant moves and renews his motion to dismiss and asks leave of the Court for reconsideration thereof, based first as a matter of law that the claim upon which relief is sought here is not one which is cognizant of equitable relief which can be granted as prayed for; second, that the Plaintiff has not exhausted the administrative remedies and therefore has a plain, adequate and complete remedy at law, as enumerated in paragraph 15 of [64] page 7 of the answer; third, that the Plaintiff has not exhausted his remedies at law, as enumerated also on page 7 of the Defendant's answer, and therefore has a plain, adequate and complete remedy at law; fourth, that the nature of the tax in question is one upon income, and the Plaintiff neither attacks nor questions the legality of the tax as such; fifth, that the nature of the tax being one upon income, the Plaintiff does not attack the Constitutionality of either the assessment, the method of collection, or the taxing statute as such; and lastly and again, that the proceedings before the Court and the relief sought in the petition are proceedings in a suit to enjoin the Collector from the assessment and collection of the tax, which suit, the very nature thereof, is expressly prohibited by the terms of Section 3653 of Title 26 of the U. S. Code.

The Court: Do you wish to be heard further on those?

Mr. Towse: No. For the purpose of argument I will reiterate the grounds set forth upon the hearing of the motion to dismiss on this motion.

The Court: Do you wish to be heard?

Mr. Kashiwa: The only thing I can say, your Honor, is that there was an answer filed in this case, and I understood that we are going ahead to trial, and now counsel makes an oral motion. I do not have any more new authorities, any more than I cited, than I submitted at the hearing of the written motion. [65] The motion, I understand, the gist of it is the identical thing to what your Honor has ruled upon. And I will submit it on that.

The Court: Mr. Towse, first of all, what basis have you in the Rules of Civil Procedure for making the motion at this time?

Mr. Towse: In that the substance of the motion, your Honor, goes to the jurisdiction of the Court, based presently upon the pleadings. I appreciate your Honor's question and I perhaps properly made my second motion at this time, which I understand according to rules is open any time during a proceeding, that is, to move the Court for a judgment upon the pleadings as joined.

The Court: That is something different. Let's come to that separately.

Mr. Towse: Very well.

The Court: But on this I don't quite understand the procedural basis that you make the motion to dismiss and enlarge upon it. Your first and

last points seem to me to be identical, namely, that the Court has no jurisdiction, which is another way of saying that the relief sought is prohibited by this particular statute, on the ruling upon the motion to dismiss. The Court recognized the existence of this statute and called attention to the exception that the Court had made to this particular statue and placed this case within the [66] category of the exception, carved out of the statute by judicial decision.

As to your fourth and fifth points about the Plaintiff not contesting the legality of the tax or the Constitutionality of the law itself, the income tax law, those are new grounds to your motion. I don't quite see the application at this present time. And as to your point about the Plaintiff failing to have exhausted his administrative remedies, as well as his legal remedies, that is an argument that you made previously, and I still cannot see why, assuming the tax imposed to be completely illegal, why one has to suffer the exhaustion of those remedies simply to establish the illegality of the tax.

Mr. Towse: As a matter of law, as I understand it, your Honor, the proceedings in cases of that nature are directed against the statute or the taxing statute itself. Here the Plaintiff is seeking his equitable relief upon the grounds of a procedural enforcement aspect. The statute or the legality or Constitutionality or non-Constitutionality of the statute in itself is not attacked. It is the procedural aspect. This Plaintiff seeks relief and asks that an assessment be set aside on the grounds that one or

more of the procedural aspects of the assessment of the tax, which has not as yet been collected, be set aside.

The Court: Yes, I understand that. [67]

Mr. Towse: May I ask the indulgence of the Court to permit me to make my second motion and to rule on both? I was a little confused myself at the state of the pleadings.

The Court: Well, I will straighten out the record at this time by denying your motion to dismiss as renewed and as amplified. Now, let's have your second motion.

Mr. Towse: May the Defendant, for the record, note an exception to the Court's ruling?

The Court: Yes.

Mr. Towse: The Defendant moves, then, for judgment upon the pleadings as joined, and with reference thereto calls the Court's attention to page 6 of the Complaint, and particularly with reference to paragraph 13 thereof. the allegation of irreparable damage. Therein is alleged the following:

> "That the plaintiff has not in his possession $9,487.51 in cash and/or in real and personal property to make payment and claim a refund, and if the defendant is permitted to seize and sell the properties of the plaintiff. the plaintiff would be irreparably damaged."

The Plaintiff in other parts of the complaint alleges engagement in the service station business as the sole means of support and income. Page 8 of the answer, if the Court please, an issue joined

therein, and paragraph 16 alleges the execution of an affidavit by the Plaintiff on October 14, 1946, wherein the Plaintiff alleges and declares his net worth, [68] sets out the items therein, not with reference to that particularly, however, but with particular reference to the note contained in the affidavit which recites that the Plaintiff

> "Quit business at the end of August, 1946, because Government is fixing road in front of service station and there isn't any more business. Rent of $150.00 per month can't be met. The service station must be raised to meet the new road level or else there will be no business. If raised by landlord, he says rent will be $200.00 per month."

I submit, your Honor, in support of the motion for judgment on the pleadings that this voluntary termination of the business of this Plaintiff, by that very fact, takes this case upon the pleadings out of the one and only ground of jurisdiction which this Plaintiff can invoke to seek the aid of this Court, in that it removes it from the class of extra-ordinary and exceptional circumstances. The inability to pay in itself, as I understand the cases, is not the basis of jurisdiction.

Now, upon the motion to dismiss, the Court found among other things extraordinary and exceptional circumstances. The financial inability of the Plaintiff to meet the assessment or the subsequent demand and notice for the tax, I submit, if your Honor please, upon the issue joined here shows

that this Plaintiff cannot suffer irreparable damage. He has himself voluntarily abandoned a business by his own statement, and that [69] fact is reflected, if the Court please, on the face of the pleadings. And that, in conjunction with the very rule that inability to pay cannot be invoked as the basis of jurisdiction for a suit to enjoin the collection of a tax. I submit, if your Honor please, that that is a matter of law and on the face of the pleadings warrants the granting of the motion for judgment on the pleadings as to this Defendant.

Mr. Kashiwa: I don't know whose pleadings he is talking about, but his recital about the store not operating and all that, that's from his own pleadings, that's all in the answer. And I don't know why he alleged those facts in the answer. He has denied certain facts in my pleadings, my original claim, and he has all these additional facts in his answer. But I don't see where that is any ground for dismissal. That hasn't been proved. You can't add those things on and then say that the case should be dismissed. I think this case should be tried on the merits. And that argument, if it's any argument at all, could come at a later stage. I don't know what the exact nature of this answer is. It states, it denies certain facts, it admits certain facts, and it adds on a lot of more facts, which of course we haven't answered to your answer at all. There is no question of that.

The Court: Nor is it allowed under the rules.

Mr. Kashiwa: And I don't see Mr. Towse's point, that is, he has alleged certain facts which we

do not at any time allege [70] in our complaint. And this answer, what the material portion is, is just a denial of our allegations or the admission of allegations. The rest of it is just extraneous, that's all.

Mr. Towse: The affidavit is a new matter.

The Court: Have you got your Civil Rules there? (Mr. Towse hands book to the Court) You base this motion, Mr. Towse, on Rule 12-B?

Mr. Howse: Yes, your Honor.

The Court: And H. Specifically, that there is a failure to state a claim upon which relief can be granted?

Mr. Towse: Yes, your Honor.

The Court: Well, that is in the nature of an old-fashioned demurrer, isn't it, that the complaint does not allege sufficient facts to constitute a cause of action?

Mr. Towse: In that also it goes to the very point of jurisdiction, your Honor, as I interpret the rules; the statute being an express prohibition of suits of this nature. There is only one recognized exception.

The Court: Yes, but on such a motion can I consider what you have alleged on your answer; isn't the motion to be tested by the four corners of the complaint?

Mr. Towse: I believe so, your Honor. The answer has verified Exhibit "A" attached to the answer, is attached to the heading of new matter. And it just happens to be an affidavit. And as I understand it, it is incontrovertible. In [71] other

words, your Honor, in June of this year this Plaintiff invoked the aid of this Court, and on October 14th the very basis on which he asks relief from the Court no longer exists; the pleadings themselves show that there is no further extraordinary or exceptional circumstance that warrants the jurisdiction of the Court. The face of the pleadings reflect it, I submit, your Honor.

Mr. Kashiwa: Your Honor, he refers to pleadings but he includes his answer, not the complaint, his answer. He alleges certain facts in his answer. Now, he should have properly brought that instead of stating the answer; on anything to abate the action he should have stated that in a separate motion before this Court. Now, it seems to me that it is very unfair. In fact——

The Court: Excuse me just a moment.

Mr. Kashiwa: Counsel could have gone ahead and stated in his answer that the taxes have all been paid by Mr. Yoshimura, and there is no issue at all. For example, he could have stated that and I wouldn't have had any chance to attack that. Then the question would be moot. The trouble with his argument is that he is stating facts which he extraneously stated in his answer. There is no necessity of my disputing the facts stated in his answer, your Honor.

The Court: In other words, he is lifting himself by his own bootstraps. [72]

Mr. Kashiwa: That's the way I look at it.

The Court: Well, let me take a few minutes off the record in this case to find out if we can't make

an arrangement on these other cases which Mr. Patterson is interested in.

(Off the record.)

The Court: I understand very clearly what you are driving at, Mr. Towse, but I am not inclined to think that at this particular time I can grant judgment upon the pleadings, especially where to arrive at that conclusion would involve taking your pleadings as containing undisputable allegations, as well as the Plaintiff's. I don't think that I can do that.

Mr. Towse: May I be permitted to make a brief showing by calling the Plaintiff to the stand and verifying the affidavit, your Honor? That will clear the evidence, if counsel seems to object to it.

Mr. Kashiwa: I certainly object.

The Court: It still wouldn't alter his complaint.

Mr. Towse: Very well, your Honor.

The Court: I am going to deny your motion on the judgment for the pleadings.

Mr. Towse: For the purpose of the record, may the Defendant have an exception to the Court's ruling?

The Court: Yes. Very well, we may now proceed with the trial. Your opening statement.

Mr. Kashiwa: Your Honor, I believe that an opening [73] statement is not necessary. The pleadings show what the facts and issues are. There is a denial by counsel. If your Honor wants any sort of a statement——

The Court: I want an outline of what you

expect to prove under this complaint, so I can follow what you are about to establish.

Mr. Kashiwa: At this time may the rule be invoked as to witnesses?

The Court: Very well. All persons in the courtroom who are scheduled to be called as witnesses for either of these parties please step outside of the courtroom and beyond the hearing of that which transpires in the courtroom, with the exception of the Plaintiff himself; and the Government may have one person stay with its attorney to assist him.

Mr. Kashiwa: My witnesses? I don't know about the other witnesses.

The Court: It applies to both sides.

Mr. Towse: Yes, your Honor.

Mr. Kashiwa: Briefly, the facts in this case are, Mr. Yoshimura, the petitioner in this case, ran a little service station business at Waiau. That's in between Pearl City and Aiea. He ran a little service station, a Shell service station, on the makai side of the road. He has been engaged in business for a number of years. These are '41, '42 and '43, as far as the taxes are concerned. In '44 or early '45, certain of the [74] tax officials of the Federal Government went down there and inspected his books. And I will show that there were certain representations made by the officials, as alleged in the complaint, which were improper, and that he was later taken to the tax office and made—not made but was assigned under certain circumstances which I will show were not proper—certain criminal confessions. And then the matter was left in

that state, circumstance, until a later time in 1945 when another group of three tax officials went down there, and Mr. Yoshimura informed them that the books were over at the Young Hotel building, and then they asked him whether he had a lawyer and he said yes, and he knew of a lawyer, that he was going to get that lawyer, and my name was mentioned. And as a result of that, he received a telephone call from the Kahumanu school, where the tax office was then located, and I went up to the office and appeared as counsel for Mr. Yoshimura, and I was supposed to hear from them at a later time.

Now, then, another group of officials from Mr. Glutsch's office went down, from Mr. Glutsch's office in the Young Hotel building, went down to Mr. Yoshimura's office, this time with an 870 waiver. And through certain representations the Defendant signed that. And after that, immediately after that, the Defendant came to my office and I went up to Mr. Glutsch's office trying to get that form back, the waiver form 870. A copy of that is in the complaint. And I was informed that [75] that had already been mailed to the mainland, it was unavailable. And at a later date we received a letter from the Internal Revenue Office in Washington, D. C., that the tax amounted to about some nine thousand odd dollars. And later Mr. Kanne sent the second notice, demand for payment of tax amounting to something over and above nine thousand dollars. And in view of the facts alleged in the petition, we brought in this.

The Court: Very well. Call your first witness.

Mr. Kashiwa: I offer in evidence what is marked "Second Notice and Demand for Income Tax," for the years 1941, '42 and '43. This is a stamped copy delivered from the Collector of Internal Revenue to the respondent in this case. I offer this in evidence.

Mr. Towse: No objection.

The Court: Very well, the same may become the Plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit "A". Are there three of them?

Mr. Kashiwa: Yes.

The Clerk: "A-1, A-2, A-3." That's for the years '41, '42 and '43.

(The documents referred to were received in evidence as Plaintiff's Exhibits "A-1", "A-2" and "A-3.")

PLAINTIFF'S EXHIBIT A-1

Form 21 A IT:B&W:TN

Treasury Department
Internal Revenue Service
Revised Sept. 1941

Second Notice and Demand for Income Tax

Date	Charge	Last Credit	Unpaid Balance	Account Number and Remarks
	1021.94			
Int.	248.79			1941 IT
Pen	510.97	.00	1781.70	Apr. 5 519000/46

Mitsukiyo Yoshimura
Pearl City
Honolulu, T. H.

Date of First Notice: 4/18/46.

Date of This Notice: 5/20/46.

The records of this office indicate that you are delinquent in making payment of the unpaid balance of tax and/or interest shown above.

It therefore becomes my duty to demand that this unpaid balance be paid, together with interest computed at the rate of 6 per cent per annum from the date prescribed for its payment to the date of payment, which interest has been incurred by failure to pay the unpaid balance within the prescribed time. If payment of the amount due the Government is not received within ten days from the date of this notice and demand, the Law pro-

vides that collection with costs may be made, if necessary, by seizure and sale of property.

To Insure Proper Credit, Return This Form With Remittance to the Collector of Internal Revenue at .....

Unpaid balance	$1781.70
Delinquency interest computed from 4/18/46 to 5/30/46	12.42
Total unpaid balance and interest thereon due as of the date indicated above.....	$1794.12

Mitsukiyo Yoshimura
Apr. 5 519000/46

F. H. KANNE,
Collector of Internal
Revenue.

Admitted 12/16/46.

PLAINTIFF'S EXHIBIT A-2

Form 21 A IT:B&W:TN

Treasury Department
Internal Revenue Service
Revised Sept. 1941

Second Notice and Demand for Income Tax

Date	Charge	Last Credit	Unpaid Balance	Account Number and Remarks
	1792.25			
Int.	328.79			1942 IT
Pen	896.13	.00	3017.17	Apr. 5 519002/46

Mitsukiyo Yoshimura
Pearl City
Honolulu, T. H.

Date of First Notice: 4/18/46.
Date of This Notice: 5/20/46.

The records of this office indicate that you are delinquent in making payment of the unpaid balance of tax and/or interest shown above.

It therefore becomes my duty to demand that this unpaid balance be paid, together with interest computed at the rate of 6 per cent per annum from the date prescribed for its payment to the date of payment, which interest has been incurred by failure to pay the unpaid balance within the prescribed time. If payment of the amount due the Government is not received within ten days from the date of this notice and demand, the Law provides that collection with costs may be made, if necessary, by seizure and sale of property.

To Insure Proper Credit, Return This Form With Remittance to the Collector of Internal Revenue at .....

Unpaid balance	$3017.17
Delinquency interest computed from 4/18/46 to 5/30/46	21.04
Total unpaid balance and interest thereon due as of the date indicated above.....	$3038.21

Mitsukiyo Yoshimura
Apr. 5 519001/46

F. H. KANNE,
Collector of Internal Revenue.

Admitted 12/16/46.

PLAINTIFF'S EXHIBIT A-3

Form 21 A IT:B&W:TN

Treasury Department
Internal Revenue Service
Revised Sept. 1941

Second Notice and Demand for Income Tax

Date	Charge	Last Credit	Unpaid Balance	Account Number and Remarks
	3510.81			
Int.	433.42			1943 IT
Pen	1755.41	.00	5699.64	Apr. 5 519002/46

Mitsukiyo Yoshimura
Pearl City
Honolulu, T. H.

Date of First Notice: 4/18/46.
Date of This Notice: 5/20/46.

The records of this office indicate that you are delinquent in making payment of the unpaid balance of tax and/or interest shown above.

It therefore becomes my duty to demand that this unpaid balance be paid, together with interest computed at the rate of 6 per cent per annum from the date prescribed for its payment to the date of payment, which interest has been incurred by failure to pay the unpaid balance within the prescribed time. If payment of the amount due the Government is not received within ten days from the date of this notice and demand, the Law provides that collection with costs may be made, if necessary, by seizure and sale of property.

To Insure Proper Credit, Return This Form With Remittance to the Collector of Internal Revenue at .....

Unpaid balance	$5699.64
Delinquency interest computed from 4/18/46 to 5/30/46	39.74
Total unpaid balance and interest thereon due as of the date indicated above.....	$5739.38

Mitsukiyo Yoshimura
Apr. 5 519002/46

F. H. KANNE,
Collector of Internal
Revenue.

Admitted 12/16/46.

Mr. Kashiwa: I offer in evidence a letter from the [76] Treasury Department, Washington, D. C., by the head of the division, J. W. Carter, with regard to the amount of the tax due in this matter.

Mr. Towse: To that we object, your Honor, on the ground that it is merely a statement and not a demand for the payment of an assessment or collection, and as immaterial to the issues in this case. The statement is already in.

Mr. Kashiwa: I'll withdraw the offer.

The Court: Very well.

MITSUKIYO YOSHIMURA,

a witness in his own behalf, being duly sworn, testified as follows:

Mr. Kashiwa: Before I go ahead, it is my understanding that counsel is going to stipulate that Mr. Kanne, the respondent in this case, is a resident of the Territory of Hawaii and his official capacity is that of the Collector of Internal Revenue within the Territory of Hawaii, and that he admits that the tax bill, Exhibit "A", three Exhibit "A's", were sent to the Petitioner, and that his duties are to collect all income taxes due in the Territory of Hawaii.

Mr. Towse: I so stipulate.

Direct Examination

By Mr. Kashiwa:

Q. Will you give us your full name, your full name, so we can hear it? Sit down.

(Testimony of Mitsukiyo Yoshimura.)

A. Mitsukiyo Yoshimura. [77]

The Court: How do you spell that?

The Witness: M-i-t-s-u-k-i-y-o, Y-o-s-h-i-m-u-r-a.

Q. You are the person suing in this case?

A. Yes.

Q. Speak out loud so we can all hear. This man has to take the notes down. How old are you?

A. Forty-two years.

Q. When did you come to the Territory of Hawaii? A. January, 1916.

Q. How old were you then?

A. Ten years old.

Q. You are a citizen of what country?

A. Japan.

Q. Were you born there? A. Yes.

Q. You have never been naturalized as a United States citizen? A. No, sir.

Q. Now, when you came here, how old were you?

A. Ten years old.

Q. At that time, how much schooling did you have in Japan?

A. Five years in the elementary school.

Q. Did they teach any English in that elementary school? A. No, sir. [78]

Q. Then after you came to Hawaii, did you go to school here? A. Yes, sir.

Q. In the English school? A. Yes, sir.

Q. Will you tell us what schools you went to?

A. First I went to Trinity Mission School for two years. Later they put me to Royal School and I stayed there another four years.

(Testimony of Mitsukiyo Yoshimura.)

Q. Now, Trinity Mission School, is that an elementary school?

A. Well, it wasn't an elementary school, although they start me off with A-B-C and they taught me about two years and they took me up to the Royal School and put me in that school.

Q. What grade did you complete at the Royal School?

A. Sixth grade.

Q. Did you go to any more schools after that?

A. Well, since my father got sick, I can't continue any more school and I asked, I beg my father to put me in a trade school, which was Territorial Trade School, and learned my business there for two years.

Q. What is your business?

A. Automobile mechanic.

Q. Now, at the trade school, what was the main course [79] of study?

A. Just tearing down automobiles and putting them back.

Q. Then after that, what did you do after graduating from the trade school?

A. Then I started help my father farm for a while. Then I went to work for somebody else.

Q. Who was that?

A. Wahiawa Garage in Wahiawa.

Q. As a mechanic? A. Yes, sir.

Q. And what did you do after that?

A. Then I left there and I worked at Highway Garage at Pearl City.

(Testimony of Mitsukiyo Yoshimura.)

Q. And then?

A. Then I left there and I started my business at Waiau.

Q. When did you start your business, what year? A. 1933.

Q. Now, you mentioned Waiau. Will you tell us where Waiau is?

A. Waiau is located where the Hawaiian Electric power plant is, between Pearl City and Aiea in the makai side of the road.

Q. That's where your service station is?

A. Yes.

Q. Any particular name to the business? [80]

A. Well, under Yoshimura Service Station.

Q. While you were operating the service station since 1933, did you have any other business?

A. No, sir.

Q. Did your wife have any other business?

A. No, sir.

Q. While you were operating the service station there, who handled your tax returns?

A. Mr. C. B. Farm.

Q. Do you know what that C stands for?

A. Well, I used to call him Chubui, C-h-u-b-u-i.

Q. Chubui Farms? A. Yes.

Q. What nationality?

A. He was a Chinese.

Q. What was his occupation?

A. Well, it seems to me he used to work for some firm before. I don't know exactly where. He

(Testimony of Mitsukiyo Yoshimura.)

must have left there some time ago and he used to take care of my books for me.

Q. Did he take care of only your books or other people's books, too?

A. No, he used to tell me he was taking care of some other people, too.

Q. Now, is he living or dead now?

A. He's dead. [81]

Q. About when did he die?

A. Well, I don't exactly remember. About sometime in 1945, I think.

Q. Now, did Mr. Farm take care of your returns up to the time he died? A. Yes, sir.

Q. Who made your 1941 tax return?

A. Mr. Farm.

Q. And your '42 tax return?

A. Mr. Farm.

Q. Your '43 tax return?

A. Mr. Farm.

Q. I'm speaking about the Federal income tax.

A. Mr. Farm.

Q. Did he make your other tax returns, the Territorial tax returns?

A. Every tax of any kind.

Q. How about the gross income tax?

A. He did file.

Q. Now, have you got that envelope there? (Witness hands an envelope to Mr. Kashiwa.) Will you explain how you kept your daily books?

A. Well, I had a cash register which is a type of

(Testimony of Mitsukiyo Yoshimura.)

bookkeeping system, and I have a sheet that it registers every day. [82]

(Mr. Kashiwa hands a sheet of paper to Messrs. Glutsch and Towse.)

Q. Now, I am going to show you this paper, marked 2-16-42. Will you explain where that paper came from? (Handing a sheet of paper to the witness.)

A. This is my sheet.

Q. What are those figures on it?

A. Well, all this figures—this is all the daily cash sales. And the last column here is which receipts on account is registered here, and totals up at the end of the day, registers here.

Q. Well, anyway this is the sheet inserted in the machine? A. Yes.

Q. And you tear this out at the end of the day?

A. That's right.

Mr. Kashiwa: Do you have any objection to this going in evidence?

Mr. Towse: I don't quite follow the purpose, your Honor. I don't like to object prematurely, but as I understand the Court has already ruled that it is not going into the amount of any assessment. If this is for the purpose of showing the correctness or alleged incorrectness of any tax assessed, then I object to it. If it is for some method of bookkeeping, of course I can't, if it is material.

Mr. Kashiwa: This is a method of bookkeeping.

Mr. Towse: If that is the purpose for which it is sought to be put in.

(Testimony of Mitsukiyo Yoshimura.)

The Court: Is that the purpose for which you are utilizing it?

Mr. Kashiwa: All this testimony, this is to corroborate his testimony that he had a bookkeeping machine, a bookkeeping cash register machine which registered these amounts. My purpose in showing that is that he knew that the amounts that were in the tax returns were correct and that he made the returns based on these figures. I am not going to dispute the figures. Remember, this is the only sheet I am going to introduce. But I want to lay the general outline of how it was done, your Honor, the daily entries, and how they were wound up at the end of the year.

The Court: In other words, that's an illustration of how the cash register worked?

Mr. Kashiwa: Yes, your Honor.

Mr. Towse: What is the relevancy of that to the prayer for injunction, your Honor? I don't quite follow it. There is an allegation that for those years——

Mr. Kashiwa: Well, it is relevant.

The Court: Just a minute. Let him finish.

Mr. Towse: There is an allegation that each such return represented the true net profit. I would submit that the returns as filed under oath are the best evidence of this, not any system of bookkeeping that is used. We can't go and explore [84] a system of bookkeeping in a service station in this manner. We'll be here for three weeks.

Mr. Kashiwa: I will later show that there were

(Testimony of Mitsukiyo Yoshimura.)

certain discrepancies when the officers visited the premises with regard to these sheets, and although he knew that these returns were based on these sheets, there may have been some error, and the officer who went to investigate pointed out one error, and that was one of the reasons why he signed this criminal statement. It was a minor mistake.

Mr. Towse: That's the very point, if your Honor please. We are going now into a discrepancy in the amount of computation of the tax, which I submit is definitely irrelevant to this. In fact, the Court has so ruled on the motion to dismiss.

Mr. Kashiwa: My argument is this, your Honor, that just for a little mistake in a tax return a person is not subject to any criminal prosecution. It must be an intentional and wilful mistake. And this officer who went down there knew that it was. He should have known that it was a very small mistake. But he picked on this little sum and really got the defendant worried. The net tax on that sum would not have been more than ten cents.

Mr. Towse: If the Court please, in answer to that, counsel has hit upon the very crux of the entire thing. Are we going into a fishing expedition to determine why or when, if not up [85] to the present time, this defendant has not been criminally prosecuted? And that's the purport of this evidence which is being offered, I submit. If your Honor please, the Government has six years to determine if this defendant shall be prosecuted,

(Testimony of Mitsukiyo Yoshimura.)

since counsel has opened up the subject, and that six years, as of the date hereof, on the date of the answer filed, has not as yet expired. I say we cannot go into that field, your Honor. It is not relevant.

Mr. Kashiwa: I cannot see how this can be a fishing expedition, your Honor. This evidence is in my hands. It is not the Government's. I am not trying to get a secret out of this. I am just trying to make the case plain for your Honor, to show your Honor that there were inducements made in this case which were improper. And if that ever happens to be part of the case of the prosecution, that's the prosecution's hard luck.

Mr. Towse: Counsel has said and stated that there is a discrepancy. That's my very point, your Honor. He says that there has been a discrepancy. Now, it takes two to make an argument. We have to come in and answer to that and show the results of the investigation, criminal or civil. I say no, your Honor. Whether or not there was a discrepancy in computation is not a part of the proceedings on this injunction, your Honor. That's the very purport of the statute, permitting the suit at law. Then the Court goes into it and determines it. But it does not pray for an injunction. [86]

The Court: I don't think we'll go into the computation of the tax in a suit of this nature.

Mr. Kashiwa: I'm not going into the computation of the tax. I don't care what the figures are

(Testimony of Mitsukiyo Yoshimura.)

here. I offer to show this as one of the several sheets, the daily sample sheets, what he did with his business and how the whole thing was wound up at the end of the year.

The Court: I'm going to allow it to come into evidence for the purpose of illustrating the type of bookkeeping this machine, this cash register, did, but for no other purpose.

Mr. Towse: For that sole purpose, your Honor?

The Court: For that sole purpose. I don't know where it will get us.

Mr. Towse: May the defendant note an exception to the Court's ruling?

The Court: You may have an exception.

The Clerk: Plaintiff's Exhibit B.

(The document referred to was received in evidence as Plaintiff's Exhibit B.)

(Testimony of Mitsukiyo Yoshimura.)

The Court: Proceed.

By Mr. Kashiwa:

Q. Now, with relations to this sheet here,—these are the daily sheets—now, how did you make up your books, Mr. Yoshimura?

A. I just transferred that to my other book. [87]

Q. Yes. And?

A. And at the end of the year I totaled up.

Q. Yes?

A. And when I filed in the reports for taxes, Mr. Farm comes over and I let him have the whole works, and he took care of everything for me.

Q. He did that each year?

A. Every month, every year.

Q. At the end of the year for the net income tax? A. Yes, sir, everything.

Q. For '41, '42 and '43? A. Yes, sir.

Q. Do you remember signing the returns for those years? A. Yes.

Q. And did the amounts correspond to the amounts in the books? I mean the total profit.

A. Well, exactly I don't remember—

Mr. Towse: Pardon me again, your Honor. I don't mean to object but I submit if we are going into the books again, that the books are the best evidence. This defendant can't testify to something that he signed in '41, that they were the same figures as they were in the set of books that aren't here in court.

The Court: Isn't that objection good?

(Testimony of Mitsukiyo Yoshimura.)

Mr. Kashiwa: Well, the books are in your hands, Mr. Towse. [88]

Mr. Towse: Very well. It's your case. You filed for an injunction. I didn't.

Mr. Kashima: I'll subpoena your books.

Mr. Towse: We are again going into the fishing field on the tax, which I submit again is irrelevant.

The Court: Proceed.

By Mr. Kashiwa:

Q. All right, now, did anyone investigate you for taxes, Mr. Yoshimura?

A. When was it?

Q. Did anyone—answer that question Yes or No—did anyone investigate you for Federal taxes?

A. Yes, sir.

Q. Who was it?

A. Well, one man I remember, Mr. Irey, and two other men came.

Q. Now, about when was that?

A. Well, I don't quite remember but——

Q. In '45 or '44?

A. Some time in 1944, I think.

Q. You mentioned Mr. Irey? A. Yes.

Q. And two other men? A. Yes.

Q. What are the names of the other two? [89]

A. Well, I know one man which Mr. Irey called him Mr. Latte, and the other person I don't remember.

Q. You don't remember his name?

A. No, I don't.

Q. Where did they come to?

(Testimony of Mitsukiyo Yoshimura.)

A. I beg your pardon?

Q. Where did they investigate you?

A. Right in my store.

Q. At Waiau? A. Yes, sir.

Q. Will you tell us exactly what happened on that day?

A. One day three of them came into my store, and this man Mr. Irey showed me his card and told me that his name was Mr. Irey, Federal investigator.

Q. Federal what? A. Investigator.

Q. Did he tell you what division he was from?

A. No, he did not. And he asked me to show my books so I show my books, what I had. He asked me if I have any cash money. Well, I had a few changes——

Q. What do you mean by "changes?"

A. Well, changes in the cash register. He wants me to open it. So I open it for him. He wants to see everything. The house was all open anyway. I wasn't living in there, just doing business. And they went all over the house and searched [90] for my books and everything and asked me if I had two sets of books. I didn't know what was meant by two sets of books. I asked Mr. Irey what is two sets of books. He said if I have another copy of books. I said I only have one copy. Then he asked me where I live. So I told him I'm living up at Aiea house number 17, New Mill Camp. Then Mr. Irey and another person went to my house where I used to live.

(Testimony of Mitsukiyo Yoshimura.)

Q. Just a moment, now. You said you lived at Aiea Camp. How far was that from your store?

A. Just about three miles.

Q. Three miles? A. Yes.

Q. And who lived over at that place three miles away?

A. My mother-in-law there. She works at the plantation and she has a house. In 1942 I was evacuated from there.

Q. From where? A. Yes.

Q. From where?

A. From Waiau, at my business section.

Q. Now, prior to 1942, prior to your evacuation, where were you living? A. At——

Q. Before you evacuated, where were you living?

A. Right in that store, right in the back of it.

Q. Then in '42 you evacuated? [91]

A. Yes, I had orders to evacuate, and I didn't have any house to go so I asked my mother-in-law, so I went up there and I lived there for four years.

Q. And that's the house you directed Mr. Irey to? A. Yes.

Q. At the time Mr. Irey went there, who was at the house.

A. Just my wife and little boy.

Q. Did you go with Mr. Irey?

A. No, sir. I sit back in the store and take care of the store and——

Q. And who was there?

A. Mr. Latte was checking up the books and he was still looking around for them, and——

(Testimony of Mitsukiyo Yoshimura.)

Q. Just a moment, now. With regard to your books, you testified that when they came in they requested for the books. Did you show your books to them? A. All my books, all what I had.

Q. What do you mean by all that you had? Where were the rest of them?

A. I didn't have any of them.

Q. Why?

A. I only had one set of books which I showed them. They collect everything.

Q. Now, how about your vouchers, did you have all your [92] vouchers?

A. That I don't understand. What does that mean?

Q. Bills.

A. Bills? Yes, I had some, and some were in my desk drawers, and my desk was—belong to a Captain Walker which he was taking charge of balloon barrage at that time—came and asked me to loan him my desk.

Q. When was this, nineteen what?

A. It was early part of 1942. And I had all those papers and what not in there, but I was so scared—they sent about seven of them soldier boys and took my desk and they used it. When they returned the desk, there was nothing in my drawer. It was all emptied. And while Mr. Irey was away, Mr. Latte off and on questioned me and asking me if I am an alien and getting me kind of scared telling about these people going to tax jail for tax evasion and what not, and a lot of people interned,

(Testimony of Mitsukiyo Yoshimura.)

and I was very much scared myself to leave my children behind me and being interned and what not.

Q. At that time how many dependents did you have?

A. Well, exactly I can't count only because——

Q. How many of your own children did you have? A. I had four for myself.

Q. Your oldest child was how old?

A. A little over two years now.

Q. The biggest child? [93]

A. The oldest, 11 years old.

Q. At that time, how old was he at the time Mr. Latte came up to your house?

A. I think it was around 9 years old, I think.

Q. And you had four at that time?

A. Yes, I had four.

Q. And did you have any other dependents?

A. Well, all these years I have been supporting my brother's family.

Q. What's wrong with your brother?

A. My brother had a goiter operation and it didn't turn out right and he's an invalid now and hasn't worked for the last 13 or 14 years, which he has seven children. Well, at that time he didn't have any income at all. I have to look over and I helped him all the way through, which if I didn't help he'll have to go under the Government care. So I struggled along and I support them.

Q. All right, now, let's go back to your conversation with Mr. Latte. Did you have any other conversation with him?

(Testimony of Mitsukiyo Yoshimura.)

A. Well, Mr. Latte picked up on a book which I made a little mistake and he always——

Q. What was that particular item?

A. Well, I have a little figure that was mis-entered in a book.

Q. How much did that involve? [94]

A. That was——

Mr. Towse: I object again, your Honor, to this line of questioning, that the books are the best evidence if available, if we are going into the computation on an error again which is not a part of these proceedings.

Mr. Kashiwa: It is not a computation. It's a little item.

The Court: It was as to what the mis-entry was. Of course, the best evidence is the books in which it was made. But for the present purposes the witness may describe it. But if it becomes a direct issue, then the books will have to be produced. The witness may answer the question.

Mr. Kashiwa: All right. May I have that question?

(The reporter read the last question.)

A. Exactly $150.

Q. What was the misstatement?

A. Well, he told me that was not listed in my book which I showed in the daily sheet. I'm pretty sure that it must be in it, but he keep on pressing me that that mistake wasn't in the book. And they always telling me that if I do such things and what

(Testimony of Mitsukiyo Yoshimura.)

not I'll be interned and what not, and it got me very scared.

Q. Did you have a safe on the premises?

A. Yes, I had. They asked me to open it and I opened it wide. They looked over everything. [95]

Q. Did they find any money in the safe?

A. Well, small changes, that's about all I had.

Q. Now, you mentioned then Mr. Irey and the other man went away. How long were they away?

A. Probably about 45 minutes, I think, and then they came back. And Mr. Irey himself didn't say anything. Mr. Latte told me again about interning and what not. And they picked up all what I had and picked up what they need, I suppose, and they left the store.

Q. What do you mean "they picked up?" Picked up what?

A. The books I had and the daily sheets. And when——

Q. Go ahead.

A. ——when they leave the store, Mr. Irey told me to come up to the Young Hotel building.

Q. Did he leave anything with you?

A. Yes, he did. He bring out a piece of paper and he wrote his name and he gave me the room in the Young Hotel.

Q. I show you this little piece of paper saying "H. Irey," signed "H. Irey, Special Investigator." (Showing a small piece of paper to the witness.)

A. Yes, this is it. He told me to come Monday morning at 9:00 a.m. Monday morning I was tak-

(Testimony of Mitsukiyo Yoshimura.)

ing care of all this milk from the Dairymen's and taking care of the children, and I told him I can't go on Monday morning and I can go on Tuesday. He says that's O.K. to come over Tuesday nine o'clock to the [96] Young Hotel building. So I went up there.

Mr. Kashiwa: I offer this in evidence, your Honor. (Handing the small piece of paper to Mr. Towse.)

Mr. Towse: Who wrote this "Tuesday?"

The Witness: "Tuesday" I wrote this out. I asked Mr. Irey, I can't go Monday because I'm taking care of the children's milk, so he told me to come Tuesday. So I cancelled that Monday and put Tuesday on there.

Mr. Kashiwa: I offer this in evidence, your Honor.

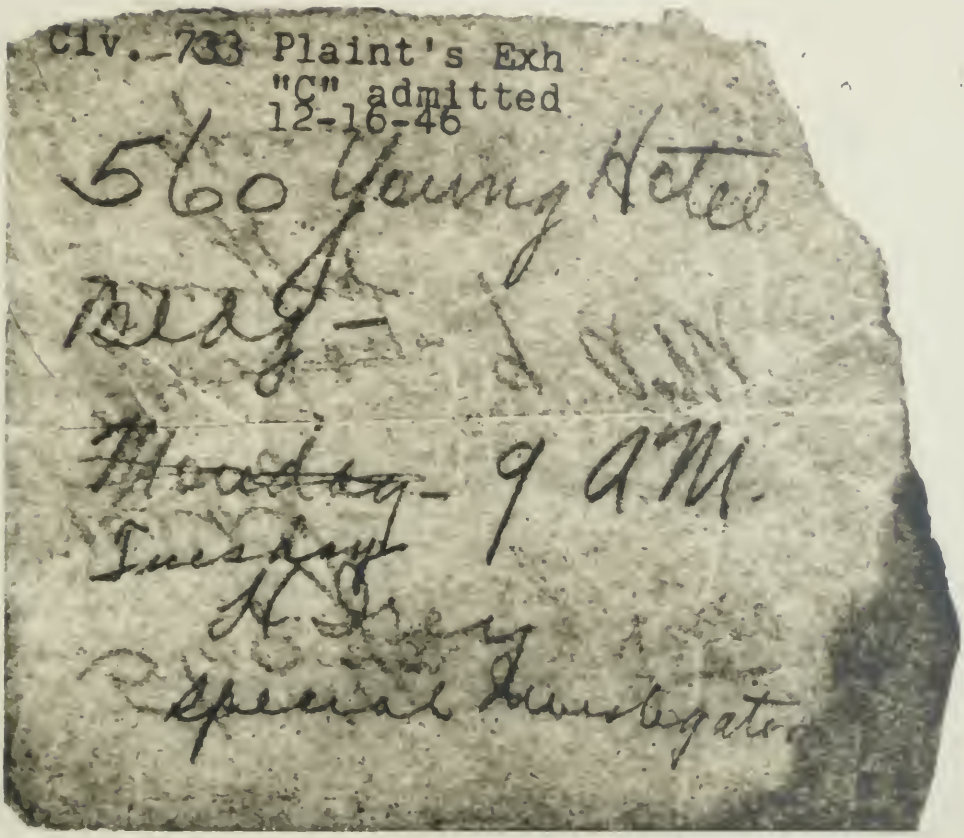
The Court: Just a minute. I hear no objection but I can't see what it particularly establishes. I hear no objection but I can't see what that slip of paper establishes.

Mr. Kashiwa: Well, I don't know whether they are going to deny that. He was asked to come up to the Young Hotel building, and all this is going to follow up. It may be material.

The Court: All right. It may become an exhibit.

The Clerk: Exhibit C.

(The paper referred to was received in evidence as Plaintiff's Exhibit C.)


Civ.-733 Plaint's Exh "C" admitted 12-16-46
560 Young Hotel
Aug -
~~Monday~~ - 9 AM.
Tuesday
H. Gray
Special Investigator

(Testimony of Mitsukiyo Yoshimura.)

Q. (By Mr. Kashiwa): Now, in response to that note, Exhibit C, what did you do?

A. Well, that Tuesday morning I went to the Young Hotel building and——

Q. Young Hotel of this city, Honolulu? [97]

A. Honolulu, yes. And I went in a room and I waited there.

Q. What room?

A. Well, I think it was 560, Young Hotel building.

Q. Yes?

A. Then I sit there, wait for him. Then he came in. He told me to sit down, so I sat down, and he told me——

Q. You give us your complete conversation, what the conversation between you and Mr. Irey was from the beginning to the end, will you?

A. Well, then, Mr. Irey told me that I have to make a statement. I says, what kind of statement? Well, he says due to this tax that you have to make a statement. He told me to write out a statement. I didn't have much of education so I didn't know how to write a statement, so I told Mr. Irey about it. Then he picked out the pencil and he started to write something. Then he wrote it out, about half of the sheet, and he went and told me that I am defrauding the Government. So I didn't know what is meant by defrauding, so I asked Mr. Irey what is meant. Then he started to explain to me. But still I don't understand clearly. And he had a lady in that room and he was asking the lady how to ex-

(Testimony of Mitsukiyo Yoshimura.)

plain the word "fraud" and what not. But still I didn't understand very well. But he wrote it down and said, told me to sign it. So I told Mr. Irey I don't understand very well these things [98] and I don't want to sign it. But he says, you might as well sign your name here, and he says, your case will be very easy. So I signed the sheet of paper there. Then he told me I can go home. So I left.

Q. Did you see Mr. Irey again after that?

A. After? Yes. Some time after he came on the Oahu Railway bus all by himself and dropped over my place and asked me for another set of books.

Q. For what?

A. Another set of books. So I told him I haven't got any. What I had they took them all. So I told him I don't have any. Then he told me some people keep a second set of books in a car some times. I had my automobile right in the garage and I told him where I have my car. And he didn't go to the car, of course. He didn't look at it. Then he stood around the store about, around five or ten minutes. Then he caught the ride and come back to Honolulu.

Q. Was that the last time you saw Mr. Irey?

A. That was the last I saw—yes.

Q. All right, now, that paper you signed in Mr. Irey's office at the Young Hotel, do you know what it said?

A. Well, I don't understand clearly.

Q. Did he give you a copy?

(Testimony of Mitsukiyo Yoshimura.)

A. No, he did not. He just wrote out on a sheet of paper. [99]

Q. Was it typewritten or in longhand?

A. Longhand.

Q. Now, at the time you went up to Mr. Irey's office at the Young Hotel, did he have your books there in front of you?

A. No, he did not. He didn't show me any.

Q. Did you discuss anything with him with relation to your books? A. No, he did not.

Q. Did he at that time tell you how much tax you owed to the Government?

A. No, he did not.

Q. All right, then, you testified last time Mr. Irey came down he asked for another set of books. Now, after that, did any other tax officials come to your house?

A. Came to the store, three of them came again.

Q. Same people? A. No.

Q. Well, who were they?

A. I do not know because they didn't give me the name but just took out a wallet and showed me a card and put it back and put it in the pocket and said that they were from Internal Revenue.

Q. Now, what was your conversation with them?

A. Well, they told me if I have some more books, so I [100] told them that Mr. Irey and the other people took all that I had so I don't have any. Well, he told me, he says, this tax case, he force me to hire a lawyer. I says, why I have to hire a lawyer that I don't know, because I was kind of worried.

(Testimony of Mitsukiyo Yoshimura.)

I don't know how much the lawyer cost me. And I didn't have enough money to do things. And I told them about it and still they told me it's better for me to hire a lawyer. So I figured, I thought to myself when the war broke out and the Foreign Funds Control asked me to report and I went to Mr. Kashiwa's and that name came to my head again, so I came to Mr. Kashiwa and told him about it and asked him to do the work for me.

Q. Did you give my name to the tax investigators? A. Yes, told them Mr. Kashiwa.

Q. And did you get in touch with me?

A. Yes, I called on you on the telephone.

Q. All right, now, did you see these three people again yourself, these three investigators?

A. You mean the second group?

Q. Yes. A. I haven't seen them since.

Q. All right, now, after that, did any further tax officials come to see you?

A. Yes. After that two persons came and didn't mention the name, said they were from the Internal Revenue.

Q. What nationality were they? [101]

A. One was Chinese and another one was haole. And brought in about two sheets of paper which something is typed on, want me to sign for it. I don't understand clearly so I asked them to wait until tomorrow and see my lawyer, Mr. Kashiwa, if it's all right for me to sign the papers. But these two persons didn't give me any chance at all; no, he said, I have to sign right away, otherwise the

(Testimony of Mitsukiyo Yoshimura.)

boss would get mad, and told me that I might go in jail or get a big fine for it. They want to get the papers signed right away and they want to take them back. Of course, I didn't want to sign for it, which I don't understand very well. But they force me to sign for it so I sign it. Then the following morning I called up Mr. Kashiwa and told——

Q. Let's stop the story there, now. The paper you signed and gave to the two people, did you sign both sheets or one? A. Both sheets.

Q. Both sheets? A. Yes.

Q. All right, now, were there any dollars and cents figures in it?

A. No, nothing in it. It's just the words typed out and had some dashes on it but no dollars and cents on it.

Q. Now, the amount in this case, the tax requested payment is nine thousand, about nine thousand four hundred dollars roughly. Were there any figures of that nature written [102] on that paper?

A. No, sir. There is no figures on it.

Q. At that time did you in any way know that your assessment was going to be nine thousand dollars? A. No, sir.

Q. Did they tell you?

A. They did not. They just show me the paper which I remember there's no dollars and cents on that sheet.

Q. When was the first time you discovered that you had to pay nine thousand dollars in taxes?

(Testimony of Mitsukiyo Yoshimura.)

A. Well, it may have come to me from the Internal Revenue registered, saying that amount was listed on it, and I brought the copy to Mr. Kashiwa.

Q. Now, you mentioned about these two Internal Revenue men coming to your place and you signed that form. Then the next day you came to my office?

A. Yes, because they didn't give me any chance at all.

Q. All right, now, what did you do after that? Did you go to see anybody? You came to my office, you remember? A. Yes.

Q. Did you go to see anybody?

A. No, I did not.

Q. Now, you mentioned the nine thousand dollars tax bill. About how many months after that did it come to you after you signed this paper with the two boys? [103]

A. I don't exactly remember.

Q. How long approximately?

A. Oh, about six months, I imagine.

Q. All right. Now, let's go back to the first time Mr. Irey came to your place, Mr. Irey, Mr. Latte and the other man you testified. Now, about how many months after that did these three people come to see you? Remember you testified the second group of Revenue men came down? A. Yes.

Q. How many months was that approximately in between?

A. About three or four months, I think.

Q. And then after that you testified that there was a Chinese man with a haole man came with

(Testimony of Mitsukiyo Yoshimura.)

the form. About how many months after that was that?

A. I don't exactly—somewhere around in 1945 sometimes, I think.

Q. You don't remember the exact date?

A. I don't remember.

Q. Do you remember putting the date in that form? A. No.

Q. All you did to that form was just——

A. Just write my name.

Mr. Kashiwa: No further questions.

The Court: Cross-examination? [104]

Cross-Examination

By Mr. Towse:

Q. Mr. Yoshimura, Mr. Irey and these two other men came some time in 1944, is that right?

A. Yes, sometimes in 1944.

Q. First time? A. Yes.

Q. What part in 1944, what month?

A. Well, I don't exactly remember, sir.

Q. Do you remember the day of the week?

A. No, I don't, sir.

Q. What part of the year was it, December or June or March or August?

A. I think somewhere around April or May, I think it was.

Q. April or May of 19—— A. 1944.

Q. Was martial law in effect then?

A. I beg your pardon?

Q. Was martial law in effect then in the Territory?

(Testimony of Mitsukiyo Yoshimura.)

Mr. Kashiwa: Your Honor, that's a matter of judicial notice.

Mr. Towse: No, your Honor. The complaint says that this man was afraid of being interned. I want to know if he knew that in April of 1944 martial law was in effect or if there was such a thing as a military governor who could put him in. [105] That's the very basis of the complaint, that he was forced by duress to do all these things. If he doesn't know whether martial law was in effect, how can he be subject to that?

Mr. Kashiwa: Well, I'll withdraw my objection if that is the purpose of it.

The Court: May I have that question again?

(The reporter read the last question.)

A. Well, that exactly I do not know, but when Mr. Irey and Mr. Latte came, he was always, Mr. Latte himself was always telling me that I would be interned and what not.

Q. What do you mean by "interned?"

A. Well, they told me they would lock me up.

Q. Who would lock you up?

A. Well, the Government.

Q. The who? A. The Government.

Q. What Government?

A. It was under the Federal Government.

Q. What Federal Government, the United States of America in Washington or the military government?

A. Well, I understand it's Federal Government of the United States.

(Testimony of Mitsukiyo Yoshimura.)

Q. The Federal Government of the United States? A. Yes, sir.

Q. In other words, Mr. Irey? [106]

A. Yes.

Q. And not the military government?

A. No.

Q. So you weren't afraid of the military government?

A. Well, it's not that I'm afraid of it but is the law violating which I done it or whatever it is—Mr. Latte always keeps telling me that either I would be in jail or I would be interned. And he always scared me.

Q. But you'd be interned? A. Yes.

Q. By whom?

A. Well, he told me the Internal Revenue.

Q. That the Internal Revenue would intern you?

A. Yes.

Q. To where? A. To where, I don't know.

Q. What for?

A. Saying that I'm cheating the United States Government and what not, which I don't remember doing it.

Q. Now, did he tell you that other Japanese alien residents of Hawaii were being interned?

A. Yes, sir.

Q. In large numbers? A. Yes, sir.

Q. He told you that? [107] A. Yes, sir.

Q. How big numbers?

A. Well, exactly he didn't tell me but he told me plenty of them had been interned.

(Testimony of Mitsukiyo Yoshimura.)

Q. For what, for violation of tax laws?

A. Violation of tax laws and all kinds of violations, he says.

Q. Because they were aliens they were being interned, is that it?

A. Well, every time Mr. Latte say, he always mentions me, that I'm an alien.

Q. Yes? Because you were an alien you were going to be interned, is that what he told you?

A. Well, he says, he told me that if you're an alien, he says, you'd better watch out, he says.

Q. You are not answering me, Mr. Yoshimura. I asked you if he told you you were going to be interned because you were an alien.

A. No, not exactly I'll be interned, but he told me a lot of people that has been interned.

Q. Yes, because they were aliens?

A. Well, exactly, he says, most of them are aliens.

Q. Yes?

A. And within that alien people some of them are—cheated the Government, the United States Government, and what not, and [108] they were interned. And he told me that I would be maybe one of them.

Q. So that you did know, that is, Mr. Latte explained to you the reasons why alien residents of Hawaii were being interned in large numbers? You did know, didn't you?

A. Well, more or less I understand.

Q. You did know, then? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. So in your complaint when it says "for unexplained reasons" is that right or wrong? You said in your complaint, "The Japanese alien residents of Hawaii were being interned and imprisoned in large numbers for unexplained reasons." You knew why they were being interned, didn't you? Did you or didn't you?

A. You see, I read the Japanese papers sometimes ago saying that people being interned.

Q. What Japanese paper?

A. Hawaii Times.

Q. When?

A. Well, I don't remember exactly the date.

Q. What year?

A. About forty—nineteen—about 1944, I imagine.

Q. Before Mr. Irey came there or after?

A. I think it was before.

Q. How long before? [109]

A. I don't remember how long before.

Q. All right. What did it say? What did this article say about it?

A. About these persons that running a business and found that they had two set of books and some other kind of mistakes, I think it was.

Q. Yes? What else?

A. That's about all that I remember.

Q. So you knew before Mr. Irey came that people were being sent to jail, didn't you? You read this all before Mr. Irey came, didn't you? Will you answer the question, please, Mr. Yoshimura?

(Testimony of Mitsukiyo Yoshimura.)

A. Yes, I think I read that before Mr. Irey came.

Q. And you knew that people had gone to jail for that, didn't you, before Mr. Irey came, didn't you? A. Yes, I read the paper.

Q. So when Mr. Irey told you that people were going to jail, you knew what he meant, is that correct? You understood what he meant?

Mr. Kashiwa: You mean Latte.

Mr. Towse: Very well, Mr. Latte. I'll give them all a chance.

A. I beg your pardon, sir?

Q. Did you understand? Let's take Mr. Latte first. When Mr. Latte told you that you would go to jail, you already [110] knew because you had read in the papers before they came out there that people or some person maybe had been sent to jail?

A. Well, Mr. Latte was in the store looking over the books and says that I had a little mis-entry there, and he keeps on telling that to me and doing things like that, why he told me that I might be interned or I might be sent to jail, and he told me that I might get a big fine for it. That's what he told me.

Q. Did that make you afraid?

A. Yes, very much, sir.

Q. Afraid of what?

A. I hate to leave my children behind. I don't know what's going to happen to them, have no income whatsoever.

Q. And you were just afraid to leave your family, is that it? A. Well, yes, sir.

Q. Had you done anything wrong?

A. What do you mean, sir?

A. Just that. Had you done anything wrong that you were afraid of, or were you just afraid of leaving your family?

A. Well, I'm not saying that I'm not scared. I'm scared of going into jail or whatever it is and leave the family behind. But I don't remember that I've done anything wrong.

Q. So you knew at that time you hadn't done anything wrong, is that what you are trying to say, Yoshimura? [111]

A. Yes, which I know of.

Q. Which you know of? A. Yes.

Q. Now, did you know then that interned alien residents were not being tried before this Federal Court here or any court but were being put in jail and detained for many years under the authority of the military governor? Did you know that? You didn't know that, did you?

A. Excuse me——

Mr. Kashiwa: May I have that?

(The reporter read the last question.)

Q. Did you know, Mr. Yoshimura, that alien residents were not being tried before this Court here, that if you did something wrong you couldn't go to court, you'd just go to jail without going to court? Did you know that?

A. I don't know, sir.

Q. You didn't know that? A. No, sir.

(Testimony of Mitsukiyo Yoshimura.)

Q. You thought you could come to court, didn't you?

A. I don't understand very well on this.

Q. Well, what I'm trying to get at, Mr. Yoshimura, is that in this complaint it says here that alien residents were being put in internment without being taken before any court. Do you understand what I mean? This is a court. You know what internment is? And that alien residents of Hawaii were being [112] interned and they weren't given a chance or taken before any court. Did you know that? A. That I didn't know, sir.

Q. You didn't know? A. No, sir.

Q. But you put it in the complaint here, is that right? Now, where did you hear that the military government was placing Japanese aliens in internment? Where did you hear that?

A. Mr. Latte told me.

Q. That's the first time you knew that?

A. Well, Mr. Irey was also telling me all that when he came to the door.

Q. In April, 1944, is that the month you said they came out there?

A. I think it was April some time, I think, in 1944.

Q. And that's the first time you knew that Japanese aliens were being put in internment by the military government? Is that the first time you knew that?

A. No, I think I read some Japanese papers before that, I think.

(Testimony of Mitsukiyo Yoshimura.)

Q. When? How long before that?

A. Well, I think about 1930—1940—1943.

Q. And what did these Japanese papers say?

A. See, I don't understand very well, but the people that come over to the store always saying those things, and it come [113] into my ears.

Q. Yes?

A. That's how I remember it.

Q. Now, did you know why they were being interned?

A. I don't know. I did not know.

Q. You don't know why? A. No.

Q. Do you know today?

A. Well, I know a little of it now.

Q. And in April, 1944, you didn't know?

A. Well——

Q. Is that correct?

A. Well, it's just a rumor that people was talking about which I heard. It came in my mind.

Q. And is that what made you fear the powers of internment? Is that what made you afraid of internment? A. Well, I was afraid, too.

Q. First you were afraid of going to jail?

A. Yes.

Q. The second was internment? A. Yes.

Q. Both? A. Yes.

Q. And Mr. Irey and Mr. Latte, they both made you afraid of that, is that right? [114]

A. Well, Mr. Irey himself hasn't mentioned much about it but Mr. Latte was always.

Q. Oh, Mr. Latte? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. Now, if they hadn't talked about this interment, Mr. Yoshimura, would you have signed those papers the first time with Mr. Irey and Mr. Latte? If they hadn't talked about internment, if they hadn't threatened you with internment, would you have signed the papers? A. Probably I did.

Q. You would have? A. Probably.

Q. If they hadn't threatened you with internment? A. Probably yes—probably not.

Q. What do you mean? You don't know?

A. I don't know.

Q. I am talking about the first statement you made, the short statement.

Mr. Kashiwa: Now, that type of question is speculative. It's incompetent, irrelevant and immaterial, your Honor.

Mr. Towse: Your Honor, it's merely in support of the allegation of the complaint which alleges that the plaintiff would not have signed the said statement of fraud had there been no such threat of internment, as a direct result of threats of internment. Your Honor, this complaint alleges that is the [115] basic reason of it, the only reason why this plaintiff signed some statement pertaining to fraud. I believe I am entitled to have it clarified.

The Court: The question is in order but I am not too sure if the witness understands what you are talking about.

Mr. Kashiwa: Put it in simple language, Ed.

Mr. Towse: May I have that?

(The reporter read the question referred to.)

(Testimony of Mitsukiyo Yoshimura.)

Q. Mr. Yoshimura, you remember the first time Mr. Irey went with Mr. Latte and another man?

A. Yes.

Q. And did you sign a short statement, did you sign a short paper there? A. No, sir.

Q. This little eight by ten line——

A. No, sir.

Q. You don't remember signing it?

A. I don't remember.

Q. You don't remember?

The Court: The only statement this witness testified to on direct examination as having signed was a statement made in Mr. Irey's office at the Young Hotel building. Is that what you are talking about?

Mr. Towse: No, your Honor.

Q. Mr. Yoshimura,—— [116] A. Yes.

Q. ——I'll give you a chance to think. You only signed one statement about your income tax trouble now, is that correct?

A. Well, one time I signed a paper at the Young Hotel building in Honolulu.

Q. Was that the first and only paper you signed about your tax trouble? A. Yes.

Q. What were you going to say?

A. Then the two people came afterward.

Q. Yes? A. After.

Q. Well, that was some printed stuff?

A. Yes.

Q. But in your own handwriting, just one time, is that correct? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. Now, when the three men came the first time in April, Yoshimura, you said that they asked you to show them the books. Did they demand the books from you? A. Yes.

Q. They demanded? A. Yes.

Q. What did they say?

A. They say they want all the books I have.

Q. Well, how did they say it, Yoshimura? Did they holler at you or hit you with something and ask you to give them the books or were they polite or what?

A. Well, they said, I want to see all your books.

Q. Yes?

A. And any papers that belongs to the store.

Q. Yes? Now, who asked you that, Yoshimura?

A. Mr. Irey.

Q. Yes? And how did he say it? Did he say it in what you might call a sassy way or what?

A. Well, not exactly sassy way, but he says—he came into the store and says, my name is Mr. Irey, and he showed me the card and put it back in his pocket. And then he says that we are from the Internal Revenue office, we came to check your books, he says. So this—I want all your books and anything that consists for the store. So I told them that everything is all open. So I showed them where the books are, and he went over. And the store and my old—my whole living room and all was all open, and I showed them where to go, and the three of them went over the house and the store and everything that I have. And they want me to open the

(Testimony of Mitsukiyo Yoshimura.)

cash register, and I open everything wide for them. And they looked around and they collect the books that I had and my daily sheets and everything.

Q. That's from the back room?

A. No, it's right in the store, it's right in the store. [118]

Q. Excuse me. That answers the question. Now, you did say, Yoshimura, that Mr. Irey said he was from the Federal Internal Revenue office just now?

A. Yes.

Q. And before you said he showed you a card and said that he was a Federal investigator. Now, which is right? You said all that Mr. Irey said was, I am a Federal investigator, and he put the card back. Now you just said he was from the Internal Revenue Tax Office. A. Yes.

Q. Now, what did he say?

A. He say—Mr. Irey told me that he's from Federal investigator.

Q. From what office?

A. Internal Revenue.

Q. Yes. He told you that, didn't he?

A. Yes.

Q. He was polite about it? A. Yes.

Q. He didn't threaten you? A. No, sir.

Q. Did he threaten you if you didn't produce the books you'd be interned?

A. Well, that I don't know.

Q. What do you mean you don't know? If he threatened [119] you, you'd know it.

A. But I was worried.

(Testimony of Mitsukiyo Yoshimura.)

Q. Did he ask you politely for the books?

A. He asked politely. But after he started to look, then Mr. Latte was over the store, after these two persons left the store. He went to my living place?

Q. Yes. You mean the camp?

A. Yes. Then Mr. Latte was in the store checking up my books and what not. And I'm tending to my customers. If I'm not busy, well he called me in and tell me that people had been interned and what not.

Q. And all this time you were tending to customers? A. Yes.

Q. Selling cold drinks? A. Yes.

Q. Gasoline? A. Yes.

Q. Answering the telephone? A. Yes.

Q. You weren't paying much attention to Mr. Latte, then?

A. No, Mr. Latte allow me to do that. He told me I can take care of my customers.

Q. Now, you have shown the books, you have produced the books from the safe, I believe, in the back room, didn't you? Weren't there some books in the safe in the back room? [120]

A. Yes, from 1941 and '42, way back.

Q. And weren't there some more records in the corner of the front room that Mr.——

A. Well, see, my books are all scattered here and there.

Q. The books are all scattered? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. What do you mean by the books? These little things here were, Exhibit A?

The Clerk: B.

Q. Pardon me. Exhibit B. These things were scattered all around?

A. These were scattered all over, too.

Q. For 1941 they were scattered around?

A. For '42.

Q. And '42?

A. And I had some in my desk drawers.

Q. For '43, too? A. Yes.

Q. You have used them already for the tax?

A. That's right.

Q. They were scattered all over the store?

A. Yes.

Q. Did you know they were scattered all over the store?

A. Well, some of them was in the drawer and some of them was in the shelf. [121]

Q. You mean for the different years? I thought you gave these things to Mr. Farm to make up the taxes.

A. Well, after he got through, some of them he brought it back to me and I left it just the way he brought it.

Q. He brings back some? A. Yes.

Q. He doesn't bring back all?

A. That I don't think, because otherwise I should have them.

Q. So your records weren't complete, then, that you showed to these investigators, is that correct?

(Testimony of Mitsukiyo Yoshimura.)

A. Well, yes, because I had some of these in my desk drawers, as I said at first. Captain Walker had my desk and he took everything out and when it came back it didn't have anything in it.

Q. So you don't know, Mr. Yoshimura, if your records that you showed to the investigators were complete? Do you know if they were complete?

A. Well, I don't think so.

Q. You don't think they were complete?

A. But all the tax has been figured by Mr. Farm. They must have all that record.

Q. Now, you said they went all over the house and searched for books and everything. You said that? A. Yes. [122]

Q. What do you mean by everything? What else were they looking for? Did they ask you for anything else besides books and records, Yoshimura?

A. They asked me how much cash money I have.

Q. Yes? You showed them what cash money you had? A. Yes.

Q. Is that what you mean by everything? You said they went, searched, went all over the house and searched for books and everything. By the house you mean the service station?

A. Service station.

Q. What else were they looking for? The books and the cash money. Anything else?

A. I don't know.

Q. Did they turn the place all upside down, knock things down and search all over the place?

(Testimony of Mitsukiyo Yoshimura.)

A. Well, anyhow, when Mr. Irey went over to my living place, my wife was home.

Q. Yes?

A. And they let the two people in and told them to look over everything they want to, and they had the doors wide open.

Q. Well, that's up at your house at the camp?

A. Yes.

Q. Well, we'll get to that in a minute. But down here at the service station—— A. Yes. [123]

Q. ——did they turn the place upside down or do anything to make you afraid?

A. Well, they did, sir.

Q. What?

A. Well, all the papers and stuff like that I had and everything, why they were going through the shelves and what not.

Q. Yes?

A. Well, the customers are in there and of course at that time the place was so dusty and filthy, but all the people that was in the store looking for the books and what not, they had gone in the front and gone in the back and come out again and done it for so many times.

Q. Yes? A. I was scared, sir.

Q. You were scared? A. Yes, sir.

Q. Well, Yoshimura, you still haven't told us and told the Court, did they turn your store upside down, did they mess up everything looking for these records, or did they just pick out what was there?

(Testimony of Mitsukiyo Yoshimura.)

A. Well, certain things, well they cannot find, they have been trying to look for, I guess.

Q. Yes?

A. Going on shelf after shelf and going around the back [124] and in the back room, they come out again.

Q. Did they do that in a nice manner, nice way? I mean, did they do it in a nice way or did they knock things down or holler at you?

A. Well, I didn't have much things to knock them down anyhow.

Q. All three of these men did this?

A. Three of them, yes.

Q. All at the same time? A. Yes.

Q. For how long? How long were they there?

A. Well, I think they have been there over an hour and one-half, I think.

Q. About an hour and one-half? A. Yes.

Q. Now, you knew that they came about the taxes and that they have the right to do that, don't you? A. Yes.

Q. You know they have the right to come and ask for books, Yoshimura? You have been in business how many years?

A. About thirteen years.

Q. By yourself? A. Yes.

Q. And you keep tax records in your business? Sure you do. You know that tax people have the right to come and examine your books if they want to, that the Federal people have that [125] right?

A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. And you didn't call your attorney then?

A. Beg your pardon?

Q. Why didn't you call your attorney when they came?

A. Why didn't I call my attorney?

Q. Yes, on the day they came. A. Yes.

Q. Demanded your books? A. Yes.

Q. And threatened you? Why didn't you call your attorney and tell him?

A. Well, I thought to myself I haven't done anything wrong so I didn't bother to hire a lawyer.

Q. And because you didn't do anything wrong you weren't afraid, is that right?

A. That's right.

Q. You weren't afraid, were you?

A. But after Mr. Latte said that I haven't entered $150 in the books, then he started to telling me about people that had been interned and going to jail and what not, see.

Q. You still haven't answered the question, Mr. Yoshimura. After all that, I want to know why you didn't call you rattorney and tell him about that? Do you want to answer the question, Mr. Yoshimura? You had seen Mr. Kashiwa already about didn't call your attorney and tell him about that? filing [126] Foreign Funds declaration, hadn't you?

A. Yes.

Q. Why didn't you call him now? They were threatening to put you in jail without being in court. The military governor was putting you in jail. If you were afraid, I want to know why there was a reason why you didn't call Mr. Kashiwa?

(Testimony of Mitsukiyo Yoshimura.)

A. In a way if I'd hire a lawyer, I don't know how much the lawyer would cost me, and I didn't have not much cash with me, and I was afraid that I cannot pay. So I thought if I could do it with myself I thought I can save the money.

Q. In other words, you weren't afraid enough of this whole thing, Mr. Yoshimura, to think that it was enough to call an attorney, isn't that right?

A. No, sir.

Q. That's right? Now, did you ask for an interpreter that day?

Mr. Kashiwa: Now, that type of question is purely argumentative. Ask him questions. No use arguing with him.

The Court: The question has been asked and answered. Proceed.

Q. Did you ask either of these men for an interpreter, Yoshimura?

A. I told them that I don't understand these hard terms. I told them that if they can explain to me the easy way in which I can understand——

Q. But you didn't ask for an interpreter, Mr. Yoshimura? You still haven't answered my question.

Mr. Kashiwa: That question is vague. When? Where?

Mr. Towse: On this first trip. We are still on this first trip, Mr. Irey and the other gentlemen.

Mr. Kashiwa: At the store there?

Mr. Towse: Yes, the service station. Still in April, 1944.

(Testimony of Mitsukiyo Yoshimura.)

The Court: I think we had better leave it there for the night. Otherwise we'll be here much later.

Mr. Kashiwa: We can run it for two weeks on this cross-examination.

The Court: Possibly. I hope not, however. Tomorrow afternoon the trial continues, at two o'clock.

Mr. Towse: If we start at one, we might be over.

The Court: It's agreeable to me.

Mr. Kashiwa: I get through about 12 o'clock, and 1:30 would be agreeable.

The Court: 1:30, then. All right. That will give you time enough to orient yourselves.

Mr. Kashiwa: Yes, your Honor.

The Court: All right.

(The Court adjourned at 4:05 o'clock, p. m.)

Honolulu, T. H., December 18, 1946

The Clerk: Civil No. 733, Mitsukiyo Yoshimura versus Fred H. Kanne, for further trial.

Mr. Towse: Ready for the defendant, your Honor.

The Court: Is the plaintiff ready? Mr. Kashiwa, are you ready?

Mr. Kashiwa: Ready.

The Court: Very well. I believe that the plaintiff was under cross examination when we adjourned. And you, Mr. Yoshimura, are mindful of the fact

that you are still under oath? You may continue with your cross examination.

MITSUKIYO YOSHIMURA,

a witness in his own behalf, having previously been sworn, resumed and testified further as follows:

Cross Examination
(Continued)

By Mr. Towse:

Q. Mr. Yoshimura, Mr. C. B. Farm made out taxes for you? A. Yes, sir.

Q. Who gave him the figures?

A. I did. I gave him the figures.

Q. Anyone else? Where did you get the figures from?

A. From the daily sheet which I transferred to the book, and I give him everything. [129]

Q. You gave him the figures that you made?

A. That's right.

Q. Did he look at your books? A. Yes.

Q. And he looked over your books and your figures? A. Yes.

Q. When did he do that, before he made out the return?

A. Before he make out the returns and all the taxes at all times when he does file in.

Q. Yes?

A. I let him have all what I have.

Q. And then he fills out the tax returns?

A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. Do you sign them? A. Yes.

Q. And he gives you copies?

A. Well, sometimes I did receive and sometimes I did not.

Q. Yes. So you don't know what Mr. Farm put in for your taxes in the return if you didn't get a copy, is that correct?

A. Well, exactly I do not know.

Q. Now, did Mr. Farm do that with all your taxes? A. All my taxes.

Q. Federal income tax?

A. Federal and Territory. [130]

Q. Income? A. Yes.

Q. Personal property tax?

A. Yes, everything. Every taxes I depend on him.

Q. Gross income? A. Yes, sir.

Q. And did he attend to any of your other business? Did he get the automobile tax for you?

A. Once in a while I used to ask him to go and get it for me.

Q. Social security? A. Yes.

Q. Business license? A. Yes, sir.

Q. Tobacco tax, liquor tax?

A. Yes, sir.

Q. Mr. Farm did all that? A. Yes, sir.

Q. And from the figures that you gave to him?

A. That's right.

Q. Now, when these men were there and you asked them, or rather they asked you where you lived and you told them that you lived at Aiea Camp? A. Yes, sir.

(Testimony of Mitsukiyo Yoshimura.)

Q. And you say after that then they went up to the house? [131] A. Yes, sir.

Q. In the house? A. Yes.

Q. Did they ask you if they could go to your house? Did they ask you if they could go to your house? A. Yes.

Q. Did they say what they wanted to go to your house for? A. Yes, yes.

Q. And what did they say?

A. They said they want to look over the house where I stay.

Q. Yes?

A. And if I have anything there, if it's all right for them to get it?

Q. Yes?

A. So I says it's O.K. with me.

Q. You told them it was O.K.?

A. Yes, sir.

Q. And in fact you telephone to your wife before they went, didn't you? A. I did not.

Q. You didn't telephone to your wife?

A. I did not telephone. Mr. Latte was over there with me.

Q. Yes? [132]

A. And he told me not to telephone out.

Q. Did anybody telephone to your wife?

A. Nobody, nobody.

Q. And they were going up to the house, you say, to look for more books? A. Yes.

Q. And some bonds, I believe, weren't there?

(Testimony of Mitsukiyo Yoshimura.)

A. Yes.

Q. And did they use an interpreter then? Did you have an interpreter there then?

A. In my store?

Q. No, at the time they asked you and you gave them permission to go to your house.

A. No.

Q. There was no interpreter and you gave them that permission, is that right? A. Yes.

Q. Now, this Captain Walker you speak of, Yoshimura—— A. Yes, sir.

Q. ——he was some officer stationed around there with a group of soldiers?

A. Yes. He was taking charge of this balloon barrages.

Q. Yes. And you knew him?

A. I know him in sight.

Q. Yes. And they came and borrowed your desk? [133] A. Yes.

Q. Did they give you a receipt for it?

A. No, they just sent the soldiers up and picked it up.

Q. Did they ask you for it before they took it?

A. Well, they ask me if Captain Walker can use my desk. I told them, yes.

Q. When was that?

A. I think that was the year 1942, I think.

Q. How long after December 7th, Yoshimura?

A. That was around about May, I think.

Q. About six, seven months after December 7th?

A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. And were you afraid when those soldiers came to take the desk?

A. Yes, I was kind of afraid.

Q. What were you afraid of?

A. Well, as I was an alien and I don't know what's going to happen to me, and they told me to evacuate the place and how I can do my business during certain hours, and I can't leave there, and I don't know what I was going to do because I didn't have any houses to go, and what became of my business, I don't know, which I was depending all on that business to——

Q. You were more worried than afraid, weren't you?

A. Well, I was worried and I was scared.

Q. And when these soldiers came, did they turn your [134] store upside down or take anything else but the desk? A. No, sir; no, sir.

Q. They didn't threaten you? A. No.

Q. Captain Walker was with them then?

A. No, sir.

Q. And eventually you got the desk back?

A. Yes.

Q. Now, when you say Mr. Irey left that day this little sheet of paper—I believe it's Exhibit B—he talked about coming to the Young Hotel building, did he? A. Yes, sir.

Q. And what did you say?

A. Well, there was—he told me to come over Monday morning.

Q. Yes?

(Testimony of Mitsukiyo Yoshimura.)

A. But then, while I was running the store, I was taking care of the children's milk from the Dairymen's, which come in every other day, and I told Mr. Irey about it and he says that's O.K. and he told me to come over Tuesday.

Q. He told you if you couldn't come on Monday to come on Tuesday? A. Yes.

Q. And he invited you to come to the Young Hotel, the room in the Young Hotel office? Did he say what for? [135]

A. No, he just told me just come and find me at this Young Hotel building, and he gave me the address on a slip of paper.

Q. Well, did you know what you were going to go down for or what you were asked to go down for, Mr. Yoshimura? A. No, sir.

Q. You had no idea?

A. No idea whatsoever.

Q. No idea whatsoever? In other words, when you got to the hotel and you found this room, you didn't know what to expect?

A. No, I did not.

Q. You didn't think it was anything about taxes?

A. Well, in a manner more or less I thought of this tax business because they already had gotten my books.

Q. So you did know it was about taxes, is that right? A. Yes.

Q. Did you call your attorney then to go with you? A. No, sir.

(Testimony of Mitsukiyo Yoshimura.)

Q. Did you ask for an interpreter or bring an interpreter with you? A. No, sir.

Q. And did Mr. Irey tell you that if you didn't go down there on that Tuesday morning that you'd be interned?

A. No, Mr. Irey did not tell me that. [136]

Q. He didn't threaten you? A. No, sir.

Q. He didn't scare you? He was polite and he invited you down and you accepted? Isn't that the way it was? A. Yes, sir.

Q. Now, when you got there on a Tuesday morning—— A. Yes.

Q. ——did you bring an interpreter with you?

A. No, sir.

Q. Did you bring an attorney with you?

A. No, sir.

Q. Now, you went in this room—560 I believe you said—and you waited a little while?

A. Yes.

Q. Who else was in the room that you were waiting in, Mr. Yoshimura?

A. I saw a lady was in there.

Q. One lady, or more than one?

A. Well, in the next room they had more, of course, but the place where I went in I saw a lady.

Q. And that's the room that you related to Mr. Irey—— A. Yes.

Q. ——that you later talked to Mr. Irey in?

A. Yes.

Q. And how long did you wait there, Mr. Yoshimura, before [137] Mr. Irey came in?

(Testimony of Mitsukiyo Yoshimura.)

A. About five minutes.

Q. And then Mr. Irey came in? A. Yes.

Q. What did he say to you and what did you say to him?

A. Well, he told me that—about this tax business—told me it wasn't filed in right.

The Court: Excuse me. Told you or asked you?

The Witness: Well, Mr. Irey told me, yes.

The Court: Well, sometimes you people who do not talk English too well use the word "told" in the sense of "asked", and I want to know if you really meant "told."

The Witness: I understand. Told me that the tax wasn't filed in right, which I thought the tax filing was everything O.K. on Mr. Farm. So I told him, I says my taxes was to be paid up for filing.

Q. Now, Yoshimura, when you were waiting there, then Mr. Irey came into the room, that's the question I asked you? A. Yes, sir.

Q. He did? A. Yes.

Q. All right. Did you speak to him first or did he speak to you?

A. Mr. Irey speak to me first.

Q. Yes, and what did he say? [138]

A. He told me "Good morning."

Q. And what did you say?

A. I say "Good morning, Mr. Irey."

Q. Now, did he then ask you to take a chair?

A. Yes.

Q. He did? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. And this other person was still in the room, this woman? A. Yes.

Q. So there were three in the room?

A. I think there was three.

Q. Well, now, you were there, Yoshimura?

A. Yes.

Q. Were there three in the room there during this time that Mr. Irey talked to you?

A. Well, I think it was three because out there I don't know what's going myself what happened, and I was nervous and I couldn't see exactly how many persons but I thought three persons were with me.

Q. There might have been more?

A. There might have been more. They had more noise. I don't think there was any door to the next room, and what not.

Q. Did you talk to anybody else except Mr. Irey that [139] morning? A. No, sir.

Q. Mr. Irey is the only one that you spoke to about taxes? A. Yes.

Q. In that room? A. Yes.

Q. Now, you say that Mr. Irey told you you had to make a statement. Now, when did he tell you that? A. Right that morning.

Q. After you had sat down? A. Yes.

Q. Now, then you testified that he told you to write out a statement?

A. He told me to write out a statement.

Q. Now, did you?

A. Well, I said to Mr. Irey that I haven't got

(Testimony of Mitsukiyo Yoshimura.)

much of an education, I don't know what kind of a statement to make out.

Q. Yes?

A. And I told him about it.

Q. Yes?

A. Then he pick up a pencil and he started write out, which I could not understand very well.

Q. Yes? [140]

A. And he went in about half way and he brought out a word "fraud", asking me if I know the word of "fraud."

Q. Yes?

A. I didn't know what it meant. I told him that I do not know what the word "fraud" meant. And he tried to explain to me and I still couldn't understand clearly, so he asked the lady was in that room how to explain the word "fraud" to me. But this woman herself said some word but which I could not understand. Then Mr. Irey said that, oh, maybe cheating or crooking or some sort of word like that.

Q. You understood those words?

A. Cheating, yes, yes.

Q. So you understood, then, what he was talking about when he was talking about fraud?

A. Well, exactly I could not understand that sentence that he wrote.

Q. Well, where was he getting this thing that he was writing, Yoshimura? Were you telling him what to write? A. No, sir.

Q. You never told him? A. No.

(Testimony of Mitsukiyo Yoshimura.)

Q. Anything to write?

A. Well, he just keep on writing it.

Q. Yes?

A. And asked me how I filed my taxes. I told him that [141] I just hand over my books and the papers to Mr. Farm. Then he kept on writing a sentence.

Q. Now, Yoshimura, I don't want you to say what was written down. I merely—that is not a part of these proceedings. I don't want to know what was written. But what we want to get clear here is, you say that Mr. Irey was writing on a sheet of paper. A. Yes.

Q. Now, it's not quite clear to me whether you were telling him what to write down on the paper or if he just picked up a piece of paper and started to write. Now, you try and recall what happened.

How did he know what to write on this piece of paper?

A. Well, I didn't know what to write myself.

Q. You are not answering my question, Yoshimura. Did you tell Mr. Irey as he wrote on this sheet of paper what to write down? Did Mr. Irey write one sentence and then did he stop and would you tell him what to write down then?

A. Mr. Irey just kept on writing.

Q. And did you tell him what to write, Yoshimura? A. I did not.

Q. You didn't tell him a single word, not one word what to write on that piece of paper?

A. Well, between time, while he is writing——

(Testimony of Mitsukiyo Yoshimura.)

Q. Yes? [142]

A. ——asked me if that tax was filed in right.

Q. Did he ask you anything else, Yoshimura?

A. Well, that's about all that I can remember.

Q. He just asked you one time if the tax was filed incorrectly, is that right? That's the only time Mr. Irey asked you anything?

A. No, he must have said something but I couldn't recall myself.

Q. All right, now. That's all right. I don't want you to recall, Yoshimura, but what I do want to know is if Mr. Irey just one time asked you what to write on the paper.

Mr. Kashiwa: That's a very unintelligible question, whether Mr. Irey just one time asked you what to write. I wouldn't be able to answer that.

Mr. Towse: Well, I was cautioned the other day not to make too long or complicated sentences and I was trying to use a little pidgin English to shorten it.

The Court: I think with reference to the prior questions that that last question is clear. The witness may answer. Do you understand the question? Do you understand the last question?

The Witness: Not exactly. I did not understand.

The Court: All right. Reframe the question.

Q. All this time Mr. Irey was writing, Yoshimura? A. Yes. [143]

Q. You remember that? A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. Now, you say that just one time he asked you what to write on the paper?

A. No, he must have some more words to me but which I don't remember.

Q. You don't remember? A. Yes.

Q. But he asked you what to write on the paper more than once? A. What to write?

Q. Yes.

A. Well, he just told me I have make a statement.

Q. Yes. Did you make a statement?

A. I did not, sir. I do not know how to make statement.

Q. Did you tell Mr. Irey what to write?

A. No, sir.

Q. You didn't? A. No, sir.

Q. In other words, Mr. Irey wrote the whole statement, is that right?

A. He wrote it down.

Q. He wrote the whole statement?

A. Yes.

Q. You didn't tell him what to write? [144]

A. I did not.

Q. Are you sure you didn't write that statement, Yoshimura? A. I did not, sir.

Q. You didn't write it in your own handwriting?

A. No, sir.

Q. You had written one statement before that, hadn't you? Wasn't this the second statement? Didn't you write one out at the service station, a short one, in your own handwriting that you signed

(Testimony of Mitsukiyo Yoshimura.)

on the Coca Cola stand, the first time that the three men came out there, a very short statement in your own handwriting?

A. That I don't remember, sir.

Q. Do you deny that you wrote a first statement, Mr. Yoshimura?

A. Which I remember that I wrote my name on it, on top of that Coca Cola cooler?

Q. Yes.

A. Was the time two persons came in.

Q. Yes? You did write the statement?

A. I did not write statement. They brought in a copy. They wanted me to sign the paper.

Q. That was when the three men were there?

A. No, two men.

Q. Two men? Now, I'm talking about the time Mr. Irey [145] and this other agent, Latte, when they were there, the very first time. It was on a Saturday about 12 o'clock. Do you remember, Mr. Yoshimura? A. No, sir.

Q. You don't? Well, do you say that you didn't sign it or didn't write out a short statement the first time when Mr. Irey and Mr. Latte and the other man were there?

A. I don't remember.

Q. You don't remember? Now, this time when the two men came, the one I think you described as the Chinese man—— A. Yes.

Q. ——did they tell you who they were?

A. They told me from Federal Government.

(Testimony of Mitsukiyo Yoshimura.)

Q. Yes. Now, that's when they asked you to sign another paper? A. Yes.

Q. Did they explain what that paper was?

A. Well, they told me it was about my tax cases. They wanted me to sign the paper.

Q. Yes?

A. Well, at that time I already seen Mr. Kashiwa, so I told the two people what it's for, I don't know, I cannot very well understand, so I told them to give me time to take the papers over to my lawyer, because every time I go up to Mr. Kashiwa he says, well, without you understanding clearly [146] not to sign any more papers.

Q. Yes?

A. But when these two persons came they rushed me so much, they didn't give me any chance which is—I asked them to give me time to take the papers over to my lawyer and see if it's all right for me to sign. Then I says I'll sign the papers. Then they told me, says, can't wait that long.

Q. Didn't one of them invite you to go right then down to see your lawyer, Mr. Yoshimura?

A. I beg your pardon, sir?

Q. Didn't one of them ask you and say, let's go down now and see your lawyer?

A. No, they did not.

Q. Did not? A. Did not.

Q. Now, you also said the next morning you called your lawyer. You mean the next morning after that, then you called Mr. Kashiwa?

A. Yes.

(Testimony of Mitsukiyo Yoshimura.)

Q. Why did you wait that long if you were so afraid?

A. Well, I figured his office was already closed. No use getting in touch with him.

Q. What time was that that you remember signing this thing?

A. That was about after 3:30. [147]

Q. After three? After 3:30 in the afternoon?

A. Yes.

Q. You didn't call him that night?

A. No, I did not.

Q. Now, didn't you——

A. These two persons, they didn't give me any chance.

Q. Yes?

A. To look over the paper either.

Q. They didn't explain?

A. And they told me, you'd better sign this paper, otherwise their boss will get very mad, and they told me I might go in jail or be with a very much heavy fine, and didn't give me any chance to see my lawyer.

The Court: Excuse me. We will have to take a brief recess while the reporter attends to a matter in Judge Metzger's division, which should not be more than a few moments, I presume.

(A short recess was taken at 2:00 p. m.)

(Testimony of Mitsukiyo Yoshimura.)

After Recess

By Mr. Towse:

Q. Now, Mr. Yoshimura, when these two men were there, did you ask them anything about the interest that you had to pay? A. No, sir.

Q. You didn't? Did they tell you anything about the interest? [148] A. No, sir.

Q. Did you ask them whether you had to pay it all at one time? A. No.

Q. Did they tell you anything that you didn't have to pay it at one time? A. No, did not.

Q. They didn't? Now, you will have to answer.

A. No, sir.

Q. I can't hear you when you shake your head.

A. No, sir.

Q. Now, one more question. At the Young Hotel there when Mr. Irey got through writing out this statement for you,——

A. Yes, sir.

Q. ——did you sign it? A. Yes, sir.

Q. Did he ask you to sign it? A. Yes, sir.

Q. What did he say?

A. He told me to look over the papers. I looked over the papers but I couldn't very well understand.

Q. Did you ask him the parts that you didn't understand, did you ask him to explain to you?

A. Well, I told Mr. Irey that which I can't understand very clearly. [149]

Q. Yes?

(Testimony of Mitsukiyo Yoshimura.)

A. And he told me, nothing to worry about, just put your name down.

Q. He said it's nothing to worry about?

A. Yes. So I put my name down.

Q. Then what happened?

A. Well, after that they told me I can go home. So I come back and I opened up the store again.

Q. Did you thank him? A. Yes.

Q. You thanked him then? A. Yes.

Q. Now, under this martial law, Yoshimura, did you ever go to court when the martial law was in effect in the Territory, any court?

A. No, sir. This is the first time I've been to court, Mr.——

Q. All right, now, you registered as an alien?

A. I beg your pardon?

Q. You registered as an alien, didn't you?

A. Yes.

Q. And you had your certificate all the time, you carried it with you? A. Yes, yes.

Q. Were you arrested or picked up by the F.B.I. or any [150] Army men? A. No, sir; no, sir.

Q. Never? You turned in firearms and weapons? A. I have none.

Q. On December 7th?

A. I did not have any.

Q. You didn't have any? A. Yes.

Q. I don't want to be misunderstood, Mr. Yoshimura. I am not saying you did or didn't. I just want to know. This case has got nothing to do with

(Testimony of Mitsukiyo Yoshimura.)

those rules. You knew about having to turn in radios that had short wave, I believe?

A. Well, I had one old radio.

Q. But you knew about those?

A. It's not the short wave. I understand we have to turn in all the radio?

Q. You understood that? You knew that you had to do that if it was short wave? That's all I want to know. I don't care if you did or not.

A. I didn't have any short wave.

Q. You understood about the curfew and blackout and all those things? A. Yes.

Q. And you obeyed those? A. Yes. [151]

Q. And you had no trouble?

A. No trouble.

Q. And you understood that everybody continued to pay taxes when martial law was on? The Government didn't say because martial law was in effect you don't have to pay taxes? A. Yes.

Q. You understood, to continue to pay taxes?

A. Yes.

Q. Now, on this one visit when Mr. Irey came out on the bus and looked around the store, you remember testifying to that? A. Yes.

Q. Mr. Irey. Will you look at this man? Is this the man that came out?

A. Yes, this man.

Q. That man came out on the bus?

A. Yes.

Q. And looked around? A. Yes.

Q. And asked about the automobile?

(Testimony of Mitsukiyo Yoshimura.)

A. Yes.

Q. The books and the automobile?

A. Yes.

Q. This is the man? A. Yes. [152]

Q. You don't own the service station any more, Yoshimura? A. No, sir.

Mr. Towse: Will you stipulate that this is his signature

Mr. Kashiwa: If you want a copy——

Mr. Towse: No, I have the original.

Q. Mr. Yoshimura.—I'm showing the witness a one-page document, the name in blue ink at the bottom, Mitsukiyo Yoshimura—did you sign that?

A. Yes.

Q. You remember signing this? I believe it's dated October 14, 1946, about a month and one-half ago. You remember this? That's where you said you quit business at the end of August, 1946, and that you have in the bank $444 in a savings account, and cash on hand of a thousand dollars.

A. Yes.

Q. And notes receivable, $250? A. Yes.

Q. You remember this? A. Yes.

Q. You signed this? A. Yes.

Q. That's your handwriting? A. Yes, sir.

Q. And it's true, then, Mr. Yoshimura, that you quit the business at the end of August, 1946? [153]

A. Yes, sir.

Q. Did you sell it or what?

A. No, I just have to give it up.

(Testimony of Mitsukiyo Yoshimura.)

Q. What do you mean by "give it up?" Did you sell it?

A. The place doesn't belong to me anymore.

Q. That's the land, as I understand it. The land was leased from the plantation, I believe.

A. No, sir.

Q. Well, you didn't own the land?

A. The land and the store.

Q. The building? A. The building.

Q. Well, did you sell the building? Did you get anything when you quit business?

A. No, sir.

Q. Nothing?

The Court: Just a minute. Did you or did you not own the land?

The Witness: I did not.

The Court: Did you or did you not own the building?

The Witness: I did not own the building.

Q. That was on lease, I believe, from the plantation. A. Yes.

Q. You sold some of the equipment, three or four hundred dollars' worth? [154] A. Yes.

Q. So you got something from the business?

A. Yes.

Q. Where are you working now?

A. I'm staying home right now.

Q. Are you working? A. I am not.

Q. And you haven't worked since you sold the business in August?

A. Well, I have no capital to do anything right

(Testimony of Mitsukiyo Yoshimura.)

now. Where I am staying at Mr. Dowsett's farm I make arrangement to lease about two acres of land now and do a little farming there.

Q. And from August to this time you are supporting your family and the seven children that you mentioned before, is that correct?

A. Seven children? I have four children.

Q. Well, you are helping your brother, I believe you said.

A. That is, from time to time I do help, sir, because my brother's oldest son started to work and helping the family now. So whatever they haven't got enough, they ask me, then I used to help them. I've been doing that for all these years.

Q. And you are not working now?

A. No, sir.

Q. You have no money coming in? [155]

A. As is now, I have no income.

Q. Very well. Now, talking about this tax, Mr. Yoshimura, did you, or through your attorney, did you write to Washington about this tax, this assessment of nine thousand dollars? You understand what I mean? You know now that the amount we are talking about is nine thousand dollars?

A. Yes. Sometimes ago I had a letter from Mr. Kanne, I think, and I drove it up to Mr. Kashiwa.

Q. That's just from Mr. Kanne?

A. Before then I think it came from Washington, too.

Q. And that's when you talked about this form you signed when you asked to have it given back

(Testimony of Mitsukiyo Yoshimura.)

to you, isn't it? What I'm talking about is the tax, Mr. Yoshimura. Did you ever write to Washington or go to Mr. Kanne's office and ask him about this tax of nine thousand dollars? You can tell me that.

Mr. Kashiwa: Your Honor, I'll make that clear. I wrote the letter.

Mr. Towse: Well, I want to merely show in closing that there are four or five steps which I feel that I shouldn't negative so far as relief on this man is concerned, other than this suit.

Mr. Kashiwa: We are not resting yet.

Mr. Towse: Well, this is cross-examination. Yoshimura, do you understand what I mean? This letter that you talk about. I believe it's the one——

The Court: Did he sign it or did the attorney sign it?

Mr. Towse: I believe counsel.

The Court: He may not know what you are talking about.

Mr. Towse: Well, Mr. Kashiwa, maybe we can simplify this. Will you stipulate that the administrative steps have been taken through or to Washington as to the amount of this assessment or the payment thereof?

Mr. Kashiwa: I want to stipulate that I wrote that letter and this answer came back. (Handing a document to Mr. Towse.) If that's what you are driving at.

Mr. Towse: I had in mind the amount of the tax. Let me put it this way: Have you taken any administrative steps through the Commissioner or

(Testimony of Mitsukiyo Yoshimura.)

through the Treasury Department contesting the amount of this assessment of nine thousand?

Mr. Kashiwa: You are asking me?

Mr. Towse: Yes, on behalf of——

Mr. Kashiwa: I'll take the stand later.

Mr. Towse: Very well.

Q. Yoshimura, have you paid this nine thousand dollars in tax? You haven't paid this tax of nine thousand dollars? Have you paid? Did you go down to pay Mr. Kanne or did you give Mr. Kashiwa the money to pay? A. No, sir.

Q. Did you give him anything to pay on this tax, any amount? [157] A. No.

Q. Speak up. What is the answer?

A. No, sir.

Mr. Towse: Well, I tender the same thing. Mr. Kashiwa, you will take the stand for this purpose?

Mr. Kashiwa: Yes.

Mr. Towse: Very well. No further cross-examination.

The Court: Redirect?

Redirect Examination

By Mr. Kashiwa:

Q. Mr. Yoshimura, when the two men came down, one was a Chinese boy, and you testified they made you sign two papers there? A. Yes.

Q. Now, did he explain to you the provisions of Section 272 of the Internal Revenue Code, what that was?

A. No. He just show me the papers.

(Testimony of Mitsukiyo Yoshimura.)

Q. Did he tell you that after you signed this, if there is any further additional tax due they can assess again?

A. No, he did not say anything about those things.

Q. Did he read this thing to you?

A. No. He just showed me, want me to sign it. He didn't have any dollars and cents on that paper.

Q. Now, this term "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," do you know what that [158] means?

A. No.

Q. Do you know what that means?

A. No, sir.

Q. Now, this store, this place of business you had at Waiau, was that only a service station? Let's say back in 1941?

A. A service station and living quarters.

Q. And what else? A. That's all.

Q. Did you sell anything? A. No, sir.

The Court: I presume he sold gasoline.

Mr. Kashiwa: Well, I mean grocery.

Q. You sold grocery?

A. In 1941 I still had a few canned goods.

Q. A little bit of groceries? A. Yes.

Q. Was it more a service station than a grocery store? A. Yes.

Q. Now, you mentioned that your place was put out of bounds. When was it put out of bounds?

The Court: That's the first I have heard of that.

A. Nineteen——

(Testimony of Mitsukiyo Yoshimura.)

Mr. Kashiwa: Well, he said that he evacuated rather. [159]

The Court: Oh.

A. I was evacuated over there April 28, 1942.

Q. And when were you permitted to come back?

A. After three and one-half years.

Q. After three and one-half years?

A. Yes.

Q. Now, were you permitted to come back there at certain hours?

A. Well, when they permitted we could go and live there.

Q. How about the business? Were you permitted to conduct your business? A. Yes.

Q. What hours were you permitted to stay at the store?

A. Seven in the morning and six in the evening.

Q. Now, about how many yards, would you say, your place of business was from the Pearl Harbor lagoon then, from the water there, how many yards?

A. Well, exactly I don't know how many yards.

Q. Well, how many miles?

A. You go straight across——

Q. From the water to your place of business there.

A. Well, if you go straight across maybe about, oh, less than a quarter of a mile.

Q. Less than a quarter of a mile?

A. Yes. [160]

(Testimony of Mitsukiyo Yoshimura.)

Q. In other words, you are very close to Pearl Harbor? A. Yes.

Q. Lagoon? A. Yes.

Q. Now, were you the only party who was told to vacate there? A. No.

Q. How about the other people?

A. There were farmers, they were the same way, they had to evacuate.

Q. Now, this statement—that's a copy of it—that Mr. Towse referred you to, that you had in the Bank of Hawaii $444.44, in savings account in the same bank $40. This statement was made in whose office? A. Mr. Kashiwa's office.

Q. That was made about two months ago, in October, 1946? A. Yes, sir.

Mr. Kashiwa: I offer this in evidence.

Mr. Towse: Is it a copy?

Mr. Kashiwa: It's in your answer.

Mr. Towse: No objection.

The Court: It may be received as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit D. [161]

(The document referred to was received in evidence as Plaintiff's Exhibit D.)

(Testimony of Mitsukiyo Yoshimura.)

PLAINTIFF'S EXHIBIT "D"

Affidavit of Net Worth

Territory of Hawaii,
City and County of Honolulu—ss.

Mitsukiyo Yoshimura, being first duly sworn, on oath deposes and says:

That the following statement is my net worth:

Bank of Hawaii, Waipahu Branch	$ 444.44
Savings account, same bank	40.00
Cash on hand	1,028.00
Accounts receivable	385.00
Notes receivable	250.00
(payor just got out of Leahi Home)	
Land and building at Aiea—	
net worth	3,000.00
(Purchased for $6.000.00, of which $3,000.00 borrowed from Bert Yoshimura, a brother, on April 27, 1946. I bought this for my home.	
No liabilities, except the $3,000.00 to Bert Yoshimura.	

Note: Quit business at end of August, 1946 because Government is fixing road in front of service station and there isn't any more business. Rent of $150.00 per month can't be met. The service station must be raised to meet the new road level or else there will be no business. If raised by landlord, he says rent will be $200.00 per month.

that this statement is made to the United States

(Testimony of Mitsukiyo Yoshimura.)

Collector of Internal Revenue to show my net worth as of October 14, 1946; and further affiant sayeth not.

/s/ MITSUKIYO YOSHIMURA.

Subscribed and sworn to before me this 14th day of October, A. D. 1946.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires August 9, 1947.

I hereby certify that the foregoing is a true and correct copy of the original.

.....
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires August 9, 1947.

Admitted 12-18-46.

Mr. Kashiwa: No further questions.

Mr. Towse: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Call the next witness.

SHIRO KASHIWA,

a witness in behalf of the plaintiff, testified as follows:

Mr. Towse: I'll waive the opening with the Court's consent.

The Court: Very well.

(Testimony of Shiro Kashiwa.)

The Witness: My name is Shiro Kashiwa. I'm the attorney for the plaintiff in this cause. During the year 1945 certain tax investigators who then had offices at the Kahumanu School building, two of them, mentioned that they formerly worked in the California division, came to my office and showed me their credentials. Prior to that time I received a call from my client, from Mr. Yoshimura, that these people had called upon him, and I made arrangements to go up to the Kahumanu School to see them about taxes for Mr. Yoshimura. And Mr. Yoshimura in the meantime had come into my office and we talked the entire matter over. And in a couple of days I went up to the Kahumanu School and I explained the whole situation to [162] them.

Now, with relation to the year 1941, I explained that service stations in that locality there were running a very cut-rate type of business, and I told them that, as a matter of fact, I was counsel for the Service Station Association, and there were three service stations in Pearl City which were charged in the police court of the City and County, in the District Court of the City and County of Honolulu for cut-rate gasoline selling, and that, although Yoshimura was not arrested, he was in the same category, too. And at that time I told them that there was a case pending in the Supreme Court of Hawaii, which I subsequently won for the service station owners. And I told them that they were not making the ordinary profits in the service station business, although their gross gallonage was

(Testimony of Shiro Kashiwa.)

very high. And I further explained to them that Mr. Yoshimura after the war was in a predicament where he couldn't sell much gasoline, and the people around there were made to vacate the area. He had a small grocery line and that he didn't make much money.

At the time I was at the Kahumanu School with these investigators, after I made my statement, it was my understanding that they were going to send me a report after that. And I didn't do anything about it. And I waited and waited and waited for this report until one day Mr. Yoshimura came into my office and told me that he had signed certain papers. And so immediately [163] after that I went up to Mr. Peterson's office at the Young Hotel.

The Court: Who is he?

The Witness: Mr. Peterson is in charge of the agents in Honolulu, Internal Revenue agents. And Mr. Peterson said that that case was in the hands of Mr. Glutsch and that I should go and see Mr. Glutsch. So I went up to see Mr. Glutsch and Mr. Glutsch told me that that 870 waiver which Mr. Yoshimura had signed had already been mailed up to the mainland, and that it was too late as far as Mr. Glutsch was concerned. I went up to see Mr. Peterson, as I said before, because in prior cases I have been successful in obtaining back the 870 form signed, and I thought I would be able to get it back from Mr. Peterson. But in this case Mr. Glutsch had mailed it up to Washington. And at that time Mr. Glutsch told me that the best way to settle this case is to make a settlement, make an

(Testimony of Shiro Kashiwa.)

offer—why don't you make an offer? And he said that. He further stated that maybe I could get—the best way is to write to Washington anyway. So I did write to Washington. And this is my letter to Washington, a copy of it. Do you want to see it? (Handing a letter to Mr. Towse.)

Mr. Towse: I have no objection to the letter as such except the contents with reference to other individuals in there, which I consider as immaterial and irrelevant to the issues here. Perhaps you'd better let the Court examine it. [164]

(Letter is handed to the Court.)

The Court: Actually it hasn't been offered.

Mr. Kashiwa: I offer this in evidence. The original was sent to Washington.

Mr. Towse: I renew the objection on the grounds heretofore made.

The Court: Will you repeat those? I didn't understand you.

Mr. Towse: The portions of the letter that go to matters referring to Mr. Latte and his reported conduct that I don't think are material at all to the issues here. If the purpose of the letter is to show that the communication was had to the Treasury Department, with an accompanying request to reopen this thing, I will admit that. But the majority of the letter there I consider to be irrelevant.

The Court: Well, the only purpose for which I will admit it will be to show that you did write to Washington asking them to reopen the case of your client.

(Testimony of Shiro Kashiwa.)

Mr. Kashiwa: Yes.

The Court: The references in there to Mr. Latte are immaterial to the present issues as I now see them.

Mr. Kashiwa: Are you willing to stipulate, Mr. Towse, that I did write to the Commissioner of Internal Revenue on the 29th day of April, 1946, attention J. W. Carter, head of the division, requesting him to reopen the case? [165]

Mr. Towse: To reopen the entire case, I believe you said. Is that what the letter said? Yes, certainly I will admit to that.

The Court: In which case you do not wish to press your offer?

Mr. Kashiwa: Yes, your Honor. I'll withdraw my offer. And you are willing to stipulate that in answer to that letter on May 20, 1946, I received a communication to the effect that they refused my request?

Mr. Towse: And stated therein the reasons and making suggestion as to what steps you should take.

Mr. Kashiwa: Yes, suggestion. I'll put this whole letter in. Do you have any objection to this letter?

Mr. Towse: I have no objection to this letter.

Mr. Kashiwa: May I offer this letter, dated May 20, 1946, from the head of the division in Washington, D. C., Treasury Department, Commissioner of Internal Revenue?

The Court: Very well, it may become the plaintiff's exhibit next in order.

(Testimony of Shiro Kashiwa.)

The Clerk: Plaintiff's Exhibit E.

(The document referred to was received in evidence as Plaintiff's Exhibit E.)

PLAINTIFF'S EXHIBIT "E"

Treasury Department
Washington 25

May 20, 1946.

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:R:E:Aj
JHB-34267
Mr. Mitsukiyo Yoshimura
Pearl City
Oahu, T. H.

Dear Mr. Yoshimura:

Reference is made to a letter dated April 29, 1946, written in your behalf by Mr. Shiro Kashiwa relative to your income tax liability for the years 1941 to 1943, inclusive. Since the records of this office do not disclose that Mr. Kashiwa has a power of attorney authorizing him to represent you in this matter, the reply to the letter is addressed to you.

(Testimony of Shiro Kashiwa.)

It is requested in the letter that your case be reopened because you did not understand the agreement signed by you; that you do not owe and cannot pay the tax and that you did not agree to pay the sum of $9,487.51.

The files in your case disclose that you signed an agreement waiving the restrictions on assessment and collection of the deficiency in tax of $6,325.00 and penalty of $3,162.51 making a total of $9,487.51. You were advised by Bureau letter of March 26, 1946, that assessment would be made immediately in accordance with the agreement.

Your recourse is to pay the tax and penalty and to file a claim for refund. The bureau has no authority to give further consideration to your case until such time as a claim for refund is filed.

Any questions relative to the payment of the amount due should be taken up with the collector of internal revenue for your district.

Very truly yours,

E. I. McLARNEY,
Deputy Commissioner.
/s/ By J. W. CARTER,
Head of Division.

Admitted 12-18-46

(Testimony of Shiro Kashiwa.)

Mr. Kashiwa: I wanted to add this, that I have what is known as a Treasury card issued by the Treasury Department.

Mr. Towse: As a licensed practitioner? [166]

Mr. Kashiwa: Before the Treasury Department.

Mr. Towse: Oh, certainly, I am aware of that. I'll stipulate to that.

The Court: Do you have it there? I have never seen one.

Mr. Towse: It's a sort of a blue—green one, I think.

Mr. Kashiwa: It's very valuable for attorneys to have that. (Handing a small blue card to the Court.)

The Court: Thank you for showing it to me.

Mr. Towse: One minute, please, Mr. Kashiwa.

Q. (By Mr. Towse): How long after Mr. Yoshimura signed this document did you make a request of Glutsch and he told you it had already been mailed?

A. If I remember it was immediately after that.

Q. Well, immediately, may we say a matter of minutes, hours, days, a week? As near as you can recall?

A. At least within that day when Yoshimura came in.

Q. Well, then, how soon after Yoshimura signed it did he come in to you?

A. That I don't know. He testified that he came in the next day.

Q. Next day? A. He testified to that.

(Testimony of Shiro Kashiwa.)

Q. Within 48 hours? A. Yes. [167]

Q. Your sequence of events was within 48 hours? Now, Mr. Kashiwa, have you taken any formal administrative steps by way of appeal to the Treasury Department as to the payment of this tax, in payment?

A. The payment? You mean trying to settle it?

Q. Either the assessment or the payment other than this controversy regarding the alleged duress on the 870.

A. Well, Mr. Towse, the procedure would be for me to take an appeal to the U. S. Tax Court.

Q. That's what I'm——

A. But I couldn't do that very well because there's a waiver form signed in this case already.

Q. If that is one of six remedies available, as I understand it, let's assume that you are precluded from doing that by virtue of the outstanding 870.

A. Yes.

Q. Now, there is still an administrative appeal under the Internal Revenue statute.

A. What's that?

Q. Where you can appeal to the Commissioner directly regarding the amount of the assessment and the amount of the tax.

A. Well, by doing that we—you mean the procedure whereby we offer to pay a lesser sum?

Q. No. That's made to the Commissioner direct.

The Court: Once again, what is the nature of that remedy?

(Testimony of Shiro Kashiwa.)

Mr. Towse: Administrative appeal, as I understand it. A. To whom?

Q. To the Commissioner.

A. To the Commissioner of Internal Revenue?

Q. Yes. Relative to the tax itself, the un-Constitutionality, the tax of assessment, not the method of assessment.

A. I wrote the letter to the Commissioner of Internal Revenue.

Q. That was the method of assessment. But as to the actual assessment made, the nine thousand dollars.

A. I always take it up with the Board of Tax Appeal.

Q. Well, as I understand, you have not taken any administrative appellate steps?

A. We have not, except for that letter I wrote.

Q. That's right? A. Yes.

Q. The tax, of course, hasn't been paid, the nine thousand dollars to Mr. Kanne?

A. It has not been paid.

Q. And, of course, since it has not been paid there is no action at law pending for the recovery of the tax against Mr. Kanne?

A. The reason why we didn't pay that tax was because we couldn't pay it, Mr. Towse. [169]

Q. However, you, in pursuance of that, did not make an offer to the Collector here to pay the thing in installments? That's another administrative step.

A. My understanding is that in order to sue for refunds you have to pay for the whole thing.

(Testimony of Shiro Kashiwa.)

Q. That is not correct, Mr. Kashiwa. The regulations provide that the Collector of the District can in equitable cases permit the payment in installments, which, of course, would not exceed a period of six years.

A. And sue for refund at the same time?

Q. No, pur—— A. Well, we don't——

Q. ——pursuant to compromise.

A. ——well, we don't want to pay a refund; we haven't paid any penny of it.

Q. You have not? Have you made an offer in compromise to the Treasury Department at Washington of a lesser amount in full discharge of the full amount?

A. No, I haven't, Mr. Towse.

Mr. Towse: No further questions.

The Court: Do you want to question yourself further?

(Witness excused.)

The Court: Call your next witness.

Mr. Kashiwa: That's our case, your Honor.

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows: that the foregoing is a true and correct transcript of proceedings in Civil No. 733, Mitsukiyo Yoshimura vs. Fred H. Kanne, U. S. Collector of Internal Revenue, held in the above-named court on December 16, 18 and 19th, 1946, before the Hon. J. Frank McLaughlin, Judge.

March 5, 1947.

/s/ ALBERT GRAIN. [253]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 254, inclusive, are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are $26.80 and that said amount has been paid to me by the appellant.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said court this 24th day of March, A.D. 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION

Comes now Mitsukiyo Yoshimura, plaintiff above named, by Shiro Kashiwa, his attorney, and hereby moves this Court to order the substitution of Henry

Robinson, Acting U. S. Collector of Internal Revenue for the District of Hawaii, as the defendant on appeal in the above entitled cause as Fred H. Kanne, the defendant above named, died on or about December 24, 1946, and the said Henry Robinson was duly appointed Acting U. S. Collector of Internal Revenue for the District of Hawaii and continues to be so and as the above entitled cause of action was instituted and the appeal being prosecuted therefrom is against the said defendant Fred H. Kanne in his official capacity as U. S. Collector of Internal Revenue for the District of Hawaii.

This motion is based on the Affidavit of Henry Robinson and the Suggestion of Death and the records of this Court in the above entitled cause of action.

Dated at Honolulu, T. H., this 21st day of January, 1947.

MITSUKIYO YOSHIMURA,
Plaintiff.
/s/ By SHIRO KASHIWA,
His Attorney. [256]

[Title of District Court and Cause.]

SUGGESTION OF DEATH

Comes now Mitsukiyo Yoshimura, plaintiff above named, by Shiro Kashiwa, his attorney, and suggests to the Court the death of Fred H. Kanne, defendant, above named, on or about December 24, 1946.

Dated at Honolulu, T. H., this 21st day of January, A.D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff.
/s/ By SHIRO KASHIWA,
His Attorney. [257]

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY ROBINSON

Territory of Hawaii,
City and County of Honolulu—ss.

Henry Robinson, being first duly sworn, on oath deposes and says:

That he was duly appointed Acting U. S. Collector of Internal Revenue for the District of Hawaii upon the death of Fred H. Kanne, U. S. Collector of Internal Revenue of the District of Hawaii, and that he has continuously held that office ever since.

/s/ HENRY ROBINSON.

Subscribed and sworn to before me this 21st day of January, A.D. 1947.

[Seal] /s/ EDWARD K. BUSH,
Notary Public, First Judicial Circuit, Territory of Hawaii. My Commission expires 6-30-49. [258]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

The motion of Mitsukiyo Yoshimura, plaintiff above named, for an order to substitute Henry Robinson, Acting U. S. Collector of Internal Revenue for the District of Hawaii, as the defendant on appeal in the above entitled cause, having come before this Court and it appearing to this Court that Fred H. Kanne, defendant above named, died on or about December 24, 1946, and that said Henry Robinson was duly appointed Acting U. S. Collector of Internal Revenue for the District of Hawaii and continues to be so and that the above entitled cause of action was instituted and the appeal therefrom is being prosecuted against the said defendant Fred H. Kanne in his official capacity as U. S. Collector of Internal Revenue for the District of Hawaii,

It Is Hereby Ordered that Henry Robinson, Acting U. S. Collector of Internal Revenue for the District of Hawaii, be substituted as the defendant on appeal in the above entitled cause of action. [259]

Dated at Honolulu, T. H., this 21st day of January, A.D. 1947.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ EDWARD A. TOWSE,
Assistant United States Atty.,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION TO STAY

Comes now Mitsukiyo Yoshimura, Plaintiff above named, by Shiro Kashiwa, his attorney, pursuant to Section 62-C of the Rules of Procedure in the Federal Courts and hereby moves for a stay by this Court during the pendency of the appeal of this cause of the collection by the Defendant of the taxes assessed, and further that this Court set an amount for a bond as provided for in said Section 62-C.

Dated at Honolulu, T. H., this 17th day of January, A.D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff.
/s/ By SHIRO KASHIWA,
His Attorney. [262]

NOTICE OF MOTION

Please take notice that the above motion will be presented to the Honorable Frank J. McLaughlin at the hour of .... o'clock ...M., on ....., the .... day of ....., 1947, or as soon thereafter as counsel can be heard, in his Courtroom in the Federal Building, Honolulu, T. H.

SHIRO KASHIWA,
Attorney for Plaintiff. [263]

[Title of District Court and Cause.]

ORDER ENJOINING COLLECTION OF TAXES DURING PENDENCY OF APPEAL

The motion of Mitsukiyo Yoshimura, plaintiff above named, pursuant to Section 62-C, Rules of Procedure of Federal Courts, moving for a stay by this Court during the pendency of the appeal of this cause of the collection by the defendant of the tax assessed, and for the setting of a bond or the requirement of other security as provided in said Section 62-C, having come before this Court on the 17th day of January, 1947, and upon the showing of the parties made at the time of the said hearing and upon the showing that the plaintiff above named, Mitsukiyo Yoshimura, intends to appeal from the final judgment entered in the above entitled cause,

It Is Hereby Ordered that the defendant, Henry Robinson, Acting U. S. Collector of Internal Revenue for the District of Hawaii, is hereby enjoined and prohibited from collecting from the plaintiff Mitsukiyo Yoshimura during the pendency of the appeal of this cause, the following: (1) the alleged Federal Income Tax [265] deficiencies of said plaintiff, to wit $1,021.94 in 1941, $1,792.25 in 1942, and $3,510.81 in 1943; (2) the fifty per cent penalties imposed thereon, to wit: $510.97 for 1941, $896.13 for 1942, and $1,755.41 for 1943; (3) and the interest to be computed under the law on said deficiencies.

Dated at Honolulu, T. H., this 21st day of January, A.D. 1947.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ EDWARD A. TOWSE,
Asst. United States Attorney,
Attorney for Defendant.

[Title of District Court and Cause.]

ORDER FOR SECURITY

The motion of Mitsukiyo Yoshimura, Plaintiff above named, pursuant to Section 62-C, Rules of Procedure of Federal Courts, moving for a stay by this Court during the pendency of the appeal of this cause of the collection by the defendant of the tax assessed, and for the setting of a bond or the requirement of other security as provided for in said Section 62-C, having come before this Court on the 17th day of January, 1947, and upon the showing of the parties made at the time of the said hearing an order enjoining the defendant from collecting from the plaintiff during the pendency of the appeal of this cause any and all taxes allegedly due for alleged delinquent income tax payments to the United States Government by virtue of assessments issued against said Mitsukiyo Yoshimura for the years 1941, 1942 and 1943, having been issued,

It Is Hereby Ordered that the plaintiff Mitsukiyo Yoshimura deposit and leave during the pendency of the appeal [267] in this cause with the clerk of this court Certificate of Title No. 35,165 issued by the Land Court of the Territory of Hawaii to Mitsukiyo Yoshimura and Midori Tateishi Yoshimura, husband and wife, as joint tenants.

Dated at Honolulu, T. H., this 21st day of January, A.D. 1947.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ EDWARD A. TOWSE,
Asst. United States Attorney,
Attorney for Defendant.

[Title of District Court and Cause.]

CONSENT OF MIDORI TATEISHI YOSHIMURA FOR DEPOSIT OF CERTIFICATE OF TITLE No. 35,165

Comes now Midori Tateishi Yoshimura, wife of Mitsukiyo Yoshimura, Plaintiff above named, and hereby consents to the deposit and leaving of Certificate of Title No. 35,165 issued by the Land Court of the Territory of Hawaii to Mitsukiyo Yoshimura and Midori Tateishi Yoshimura, husband and wife, as joint tenants, during the pendency of the appeal in the above entitled cause with the clerk

of the above entitled court, and she further agrees that said Certificate of Title may be kept by said clerk of court during the pendency of the appeal.

Dated at Honolulu, T. H., this 18th day of January, 1947.

/s/ MIDORI TATEISHI YOSHIMURA.

Approved as to Form:

/s/ EDWARD A. TOWSE,
Asst. United States Attorney,
Attorney for Defendant.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed upon by the parties herein through their respective counsels that the Record on Appeal herein may be supplemented by the addition to and inclusion of the following in said Record on Appeal:

1. Motion for Substitution, Suggestion of Death, Affidavit of Henry Robinson and Order of Substitution.

2. Motion to Stay, Notice of Motion, Order Enjoining Collection of Taxes during Pendency of Appeal, Order for Security and Consent of Midori Tateishi Yoshimura for Deposit of Certificate of Title No. 35,165, and

Clerk's certification of receipt of said Certificate of Title.

3. This Stipulation.

Dated at Honolulu, T. H., this 27th day of March, A.D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant.

/s/ By SHIRO KASHIWA,
His Attorney. [271]

The foregoing Stipulation is hereby approved this 27th day of March, A.D. 1947.

FRED H. KANNE,
Defendant-Appellee.

/s/ By EDWARD A. TOWSE,
Assistant United States Attorney, Attorney for Defendant-Appellee. [272]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered

from 255 to 273, inclusive, are a true transcript of the additional pleadings requested by stipulation in the above-entitled cause, as the same remains of record and on file in my office, said additional pleadings to be supplemented to the record on appeal in said cause, and that the costs of this supplemental transcript of record are $9.00 and that said amount has been paid to me by the appellant.

I further certify that Certificate of Title No. 35,165 issued by the Land Court of the Territory of Hawaii to Mitsukiyo Yoshimura and Midori Tateishi Yoshimura, has been deposited with me in this office.

In Testmony Whereof, I have hereto set my hand and affixed the seal of said court this 28th day of March, A.D. 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii. [273]

In the United States Circuit Court of Appeals
for the Ninth Circuit

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant,
vs.

HENRY ROBINSON, Acting U. S. Collector of Internal Revenue,
Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII IN CIVIL CASE No. 733

Mitsukiyo Yoshimura, Plaintiff-Appellant above named, intends to rely upon the following points on this appeal herein:

1. That the United States District Court for the Territory of Hawaii erred in granting, after counsel for said Plaintiff-Appellant rested his case, the Motion to Dismiss of counsel for Defendant-Appellee above named, on the ground that the United States District Court for the Territory of Hawaii had no jurisdiction in said cause. (Certified Record on Appeal, Page 247; Written Order Sustaining Motion to Dismiss, Certified Record on Appeal, Pages 40-43.)

2. That the United States District Court for the Territory of Hawaii erred in granting, after counsel for said Plaintiff-Appellant rested his case, the Motion to Dismiss of counsel for said Defendant-Appellee, on the ground that said Plaintiff-Appellant's evidence adduced in said Court was not sufficient to grant the relief as prayed for by said Plaintiff-Appellant. (Certified Record on Appeal, Page 247; Written Or-

der Sustaining Motion to Dismiss, Certified Record on Appeal, Pages 40-43.)

Dated at Honolulu, T. H., this 9th day of April, A.D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant.

/s/ By SHIRO KASHIWA,
His Attorney.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Agreed and stipulated by the parties above named, through their respective counsels, that the entire Record on Appeal, added thereto by a Supplemental Record on Appeal, of the cause of Mitsukiyo Yoshimura vs. Henry Robinson (the latter being substituted in place of Fred H. Kanne, deceased), tried before the United States District Court for the Territory of Hawaii as Civil Case No. 733, including all the exhibits in evidence in said cause, filed and docketed in the above entitled Court be printed with the following exceptions:

1. The several fly-leaves. (Certified Record on Appeal, Pages 4, 14, 19, 32, 34, 36. 39, 44, 48, 52, 255, 261, 264 and 270.)

2. The arguments transcribed in the Transcript of Proceedings, said arguments being in regards to the Motion to Dismiss made by counsel for Defendant-Appellee above named after counsel for Plaintiff-Appellant above named

had rested his case. (Certified Record on Appeal, Pages 171-252.)

Dated at Honolulu, T. H., this 9th day of April, A.D. 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant.
/s/ By SHIRO KASHIWA,
His Attorney.

Approved:

HENRY ROBINSON,
Defendant-Appelle.

By the United States Attorney, District of Hawaii, His Attorney.

/s/ By EDWARD A. TOWSE,
Asst. United States Attorney,
District of Hawaii.

[Endorsed]: Filed April 14, 1947.

[Endorsed]: No. 11584. United States Circuit Court of Appeals for the Ninth Circuit. Mitsukiyo Yoshimura, Appellant, vs. Henry Robinson, Acting U. S. Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed April 14, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11584

United States
Circuit Court of Appeals
For the Ninth Circuit

MITSUKIYO YOSHIMURA,

Appellant,

vs.

HENRY ROBINSON, Acting U. S. Collector of Internal Revenue,

Appellee.

SUPPLEMENTAL

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii

Rotary Colorprint, 870 Brannan Street, San Francisco 8-15-47—60

No. 11584

United States
Circuit Court of Appeals
For the Ninth Circuit

MITSUKIYO YOSHIMURA,

Appellant,

vs.

HENRY ROBINSON, Acting U. S. Collector of Internal Revenue,

Appellee.

SUPPLEMENTAL

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii

Rotary Colorprint, 870 Brannan Street, San Francisco

The Court: Very well. Call the Government's first witness.

Mr. Towse: If the Court please, may I have one moment? The defendant at this time moves that the complaint be dismissed upon two grounds: first, that upon the facts and the law the plaintiff has made no showing to any right or any relief prayed for in the complaint; and second, that the complaint, insofar as this hearing and the Court is concerned, is wanting in jurisdiction.

On the first ground, briefly as I understand the situation, the jurisdiction of the Court was in question, and permanent injunction prayed for, and cancelling of an administrative form, that is, the 870, and a permanent injunction prayed for as to the assessment and collection of the tax. The sole exception being that in cases of extraordinary circumstances the Court would invoke the jurisdiction. I don't dispute that question nor that ruling of law.

Now, we have here, if the Court please, the following—following the preliminary motion to dismiss, I submit, the facts brought out by the plaintiff themselves do not warrant the relief or sustain the jurisdiction which had already been invoked, in that the irreparable damage on the question of equity shows that the plaintiff was at one time engaged in the service station business. It is undisputed that since August '46 he has no longer been engaged in the business. And it is my understanding, and the cases so hold, that irreparable damage to a business or to an individual in itself

is insufficient to invoke the equitable jurisdiction in a matter of this nature. The unusual hardship and circumstances, again I submit the facts brought out by the plaintiff himself. I say in that respect, your Honor, that it is a large amount, and I offered this affidavit, and, of course, I am bound by the one that was put in. But is there any difference, if the Court please, between this defendant and any other person who at one time or another in his life, having been confronted with tax difficulties, finds himself in a position where he can't discharge the amount assessed through enforcement or administrative channels. The statute and Internal Revenue regulations provide—and it is so pleaded in the answer—five separate ways and means by which this defendant can proceed. I say five, your Honor, for this reason: my understanding on the invoking of equitable jurisdiction is that there must be a complete absence of a plain and complete and adequate remedy at law. Here ,your Honor, the defendant affirmatively alleges—let's assume that one of them is concluded by virtue of 870 being executed. This defendant, if your Honor please, I say has not exhausted either the administrative or legal channels prior to invoking the aid of equity and the jurisdiction of this Court on that particular point. And the one of hardship I reiterate, your Honor, I say here is completely lacking in view of the alternatives which this plaintiff has not availed himself of.

Now, the irreparable damage alleged, and recounting what I said a minute ago, as I understand

the cases, the irreparable damage of inability to pay is not in itself sufficient grounds to invoke the aid of this Court to the end that a permanent injunction issue.

Mr. Kashiwa: Your Honor, I think I never did make that form 870, which is part of the record, the evidence in this case. May I reopen the case? I have a similar form here. May I offer this at this time?

The Court: Any objection?

Mr. Towse: No objection.

The Court: Very well, it may become the plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit F.

(The document referred to was received in evidence as Plaintiff's Exhibit F.)

PLAINTIFF'S EXHIBIT F
Civil 733
Admitted 12-18-46

Form 870
Treasury Department
Internal Revenue Service
(Revised June 1941)

(Date Received)

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Pursuant to the provisions of section 272(d) of the Internal Revenue Code and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in section 272(a) of the In-

ternal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
income tax in the sum of $.....
taxable year ended.....
(declared value) excess-profits
tax in the sum of $.....
taxable year ended.....
excess profits tax in the sum of $.....
taxable year ended.....
in the sum of $.....

amounting to the total sum of.....$.....
together with interest thereon as provided by law.

.....
(Taxpayer)
.....
(Taxpayer)
.....
(Address)
By .....
Date.....

Note:—The execution and filing of this waiver at the address shown in the accompanying letter

will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

Honolulu, T. H., December 19, 1946

2:05 o'Clock P.M.

The Clerk: Civil No. 733, Mitsukiyo Yoshimura versus Fred H. Kanne, Collector of Internal Revenue, for further trial.

Mr. Towse: Ready for the defendant, your Honor.

The Court: I believe when we adjourned yesterday we were still discussing the merits, if any, of this motion to dismiss.

Mr. Towse: At this time, if your Honor please, I owe counsel an apology on my representation yesterday that he had not filed a power of attorney, executed by this plaintiff. I found this morning that there was in a file which was in another office of Mr. Glutsch a duly executed power of attorney. And I ask that my remarks with reference to the failure to file the executed power of attorney relative to his representation of his client be stricken from the record.

The Court: I am not sure it is necessary to strike it from the record.

Mr. Towse: Very well.

The Court: So long as it is corrected. Further, it seems to me on that particular point, from this circular number 230 that you made available to me this morning, that that power of attorney is only required where the attorney representing the client has a tax case which he is handling upon a contingent basis.

Mr. Towse: I believe there is one paragraph

that is marked in italics, your Honor, which requires in every instance——

The Court: No, page seven of this says, when a power of attorney is filed it shall be the duty of the attorney to file with the same this particular statement. (Indicating on a pamphlet.) You are referring perhaps to the matter over here. (Indicating.)

Mr. Towse: Section eight.

The Court: Section eight on page fifteen, which says the power of attorney may be required, whereas if the attorney represents a client on a contingent fee agreement then he has to file a power of attorney. Not that it makes any difference, because you say that this power of attorney was filed anyway.

Mr. Towse: I don't like to bother your Honor, but the latter part there says, "In the prosecution of claims before the Bureau of Internal Revenue, involving the assertion of demands for payment of money by the United States, proper powers of attorney shall always be filed before an attorney or agent is recognized." That is the part.

The Court: Well, that conflicts with the first sentence which says "may." It shall be a direction to the employees in the Internal Revenue Department that they shall require it in such instances. I don't know. It doesn't make much difference here anyway. There was one apparently on file.

Mr. Kashiwa: May the record at this time be reopened and that fact be shown for the record?

The Court: Based on the evidence introduced by the plaintiff to support the allegations of this

complaint I must take that evidence in its most favorable light. My sympathies are definitely, obviously, with the taxpayer, because I definitely think, if the facts are as the plaintiff's evidence peiture them to be, that the representative of the Treasury Department certainly acted arbitrarily and in an unbecoming manner in this case. But no matter how much my sympathies might be with the taxpayer, based on these facts, unless he can successfully bring himself within the exception to this statute as carved out by the judicial decisions, there is nothing much I can do about it. And I am not satisfied that the plaintiff has brought himself within the scope of this limited exception, in that there is no showing either that the tax is illegal or that the lawful tax as applied to this particular plaintiff is illegal. In the absence of such showing, plus a showing that there are unusual and exceptional circumstances, which last point the evidence may meet, I am inclined to grant the motion to dismiss.

Mr. Kashiwa: Your Honor, if that is the case—I tried to reopen the case for further proof in that there is no such additional amount due.

The Court: That wouldn't cover the point of the ruling. In other words, in this proceeding it is not permissible for this Court to compute what the tax is or what it should have been. I have no such power as that. So I am not interested in the computation of the tax here, so that I would not allow you to reopen on that point, although the record may show that you offered to reopen on that

point and that I will deny your request and you may have an exception on that ground, too.

Mr. Kashiwa: Yes. Then your Honor's position in this case is that the type of case that could come into this Court is only the type of case where one says that he is within the class or not within a class, is that it?

The Court: No, I am not going to answer your question in that way. But I will repeat my ruling in a little different language, that I find as a matter of law that it is necessary, in order to come within this exception, one, that the plaintiff established that the tax is illegal or that the exaction of the tax as applied to him is illegal; and secondly, there are unusual and special circumstances. On the second point you may have sufficient evidence to meet that requirement. But I find that you failed on the first point to prove, as I have said, either that the tax is illegal or that it is illegal as applied to this taxpayer.

Mr. Kashiwa: That is not clear to me. Your Honor, when I have a decision rendered to me, I'd like to have it very clear.

The Court: All right, very bluntly, you have not established that the income tax law is illegal.

Mr. Kashiwa: Oh, the income tax law is illegal.

The Court: Nor have you established that the income tax law as applied to this taxpayer is illegal.

Mr. Kashiwa: How about the rules and regulations thereunder? How about them, now, as applied to this party? They are working under rules and regulations how to collect; when an 870 is acquired,

that they can forthwith issue this assessment. Now, my contention is that that is where that illegality comes in. I am not saying that the income tax law is illegal, but in the way they administer the rules and regulations.

The Court: I know that is your contention, and for some time I thought that you had a point well taken. But I am now satisfied that that is not so, that there is a distinction between an illegal assessment and an illegal tax.

Mr. Kashiwa: Well, your Honor, that there is a distinction between an illegal tax and an illegal assessment, I am quite sure that I can enlighten your Honor on that.

The Court: Well, I think possibly we spent enough time on that.

Mr. Kashiwa: As far as I'm concerned, your Honor, this question came up, this very fine point came up during this argument here, and I haven't had much time. But if that is your Honor's holding, I can show your Honor that that is not correct. I am perfectly willing, your Honor, to look up authorities and submit authorities. I haven't been given the proper time. These matters are very complicated. It is a type of law which we seldom run into. And I am willing to submit authorities, if your Honor wishes. And if that is the point your Honor wishes to differentiate upon, I am perfectly willing to go to bat and show your Honor that there is no such distinction.

The Court: I don't think there is any necessity of that. That is my ruling. I am not going to

change it. If you want to appeal, why you can go to the Ninth Circuit Court, that I am wrong.

Mr. Kashiwa: Your Honor, I am willing to submit authorities and try to get the right view on this thing. If your Honor is mistaken, I am willing to inform your Honor about it. I haven't had the time to look this thing up. It's just the very fine point, and I am willing to be perfectly fair on this thing and willing to work out the thing for my client. It's a sum which involves his life savings and it's something which is very important to him, and I wish that I had been given an opportunity, I wish that I would be given an opportunity to be heard.

The Court: Well, the ruling will stand. I appreciate the position in which you find yourself. You have a right to appeal, and you have full and complete exceptions to the ruling. I might add that I don't particularly like it either. So there is nothing personal in the ruling.

Mr. Kashiwa: Well, your Honor, there is no necessity, the way I look at it, to make this ruling right here this afternoon.

Mr. Towse: Oh, yes.

Mr. Kashiwa: I am willing to submit authorities.

The Court: You may move for the Court to reconsider its ruling and submit points in authorities in support of the proposition, and if I feel that they are worthy of further consideration, I will pass on your motion to reconsider. But this thing has got to come to an end some time. I am

satisfied that my ruling is correct. You have remedies from the ruling. The only possible thing that I would consider would be a motion by you, based on points in authorities to reconsider the ruling of the Court. Do you want to do that?

Mr. Kashiwa: I would rather have the question opened, your Honor. Then we can come to court on a day certain and I will submit briefs on the points. I am perfectly willing to do that, because it is a very important matter and counsel is willing to submit authorities on the very disputed points of law. It is within your discretion to hold your decision up one way or another. This is only on a motion to dismiss. And I am really conscientious about this matter and I do feel that that would be the just thing.

The Court: I know very well how conscientious you are about it and the position in which you find yourself, and I agree with you that your client has been treated rather shabbily by the income tax people, if the allegations are such as you outline in your complaint and as outlined by your evidence. I repeat, that my sympathies are with your side of the case, but I have given this matter some time and attention, as you must have done before you came into court, and that is my considered ruling on the matter. And you have a right to appeal and convince the Ninth Circuit Court that I am wrong. And I have also indicated to you that I will give you an opportunity to move the Court to reconsider

its ruling, if you want to, filing points in authorities to indicate wherein I am wrong. But the ruling as made this afternoon will stand.

Mr. Kashiwa: Well, your Honor, at this time may I have an exception to your Honor's ruling?

The Court: You certainly may.

Mr. Kashiwa: On the grounds that it is contrary to law and the facts.

The Court: You certainly may. All right.

(The Court adjourned at 4:10 o'clock p.m.)

In the United States Circuit Court of Appeals
for the Ninth Circuit

On Appeal from the United States District Court
for the Territory of Hawaii in Civil Case No. 733

No. 11584

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant,

vs.

HENRY ROBINSON, Acting U. S. Collector of Internal Rvenue,
Defendant-Appellee.

STIPULATION

It Is Hereby Stipulated and agreed upon by the parties above named, through their respective counsels, that a Supplemental Transcript of Record of the above entitled cause be printed and filed in said cause in the above entitled Court, said Supplemental Transcript of Record to contain the following:

1. Pages 107-110 of the Transcript of Proceedings (Certified Record on Appeal, Pages 170-173), beginning with "The Court: Very well. Call the Government's first" at the very bottom of Page 107 of said Transcript of Proceedings (Certified Record on Appeal, Page 170) and ending with "(The document referred to was received in evidence as Plaintiff's Exhibit F)" on Page 110 of said Transcript of Proceedings (Certified Record on Appeal, Page 173.

2. Plaintiff's Exhibit "F" in evidence.

3. Pages 133-135 of the Transcript of Proceedings (Certified Record on Appeal, Pages 196-198) ending with "The Court: Yes. Yes, the record may affirmatively show that Mr. Towse corrects a statement that he made yesterday." on Page 135 of said Transcript of Proceedings (Certified Record on Appeal, Page 198).

4. Pages 184-189 of the Transcript of Proceedings (Certified Record on Appeal, Pages 247-252.)

5. This Stipulation and Order.

Dated at Honolulu, T. H., this 18th day of July, 1947.

MITSUKIYO YOSHIMURA,
Plaintiff-Appellant,

By /s/ SHIRO KASHIWA,
His Attorney.

HENRY ROBINSON,
Acting U. S. Collector of
Internal Revenue,
Defendant-Appellee,

By THE UNITED STATES
DISTRICT ATTORNEY
for the District of Hawaii,
His Attorney.

By /s/ EDWARD A. TOWSE,
Assistant United States
District Attorney for the
District of Hawaii.

[Title of Circuit Court of Appeals and Cause.]

ORDER

In view of the foregoing Stipulation attached hereto

It Is Hereby Ordered that a Supplemental Transcript of Record of the above entitled cause be printed as provided in the foregoing Stipulation and filed in the above entitled Court, said printing and filing to be done according to Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, this 23rd day of July, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

Approved:

HENRY ROBINSON,
Acting U. S. Collector of
Internal Revenue,
Defendant-Appellee,

By THE UNITED STATES
DISTRICT ATTORNEY
for the District of Hawaii,
His Attorney.

By /s/ EDWARD A. TOWSE,
Assistant United States
District Attorney for
the District of Hawaii.

[Endorsed]: Filed July 23, 1947.

[Endorsed]: No. 11584. United States Circuit Court of Appeals for the Ninth Circuit. Mitsukiyo Yoshimura, Appellant, vs. Henry Robinson, Acting U. S. Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed April 14, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MITSUKIYO YOSHIMURA,
Appellant,

vs.

JAMES M. ALSUP, the United States Collector of Internal Revenue for the District of Hawaii,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

SHIRO KASHIWA,
307 Hawaiian Trust Building, Honolulu, T. H.,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MITSUKIYO YOSHIMURA,
Appellant,

vs.

JAMES M. ALSUP, the United States Collector of Internal Revenue for the District of Hawaii,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Pursuant to Section 24 of the Judicial Code as amended, USCA Title 28, Section 41, Paragraphs 1 and 5, and to Rules 2 and 65 of the Federal Rules of Civil Procedure, the Appellant, Mitsukiyo Yoshimura, brought a suit, in the United States District Court for the District of Hawaii, against Fred H. Kanne, the United States Collector of Internal Revenue for the District of Hawaii, the Appellee, to permanently enjoin the latter from collecting from the Appellant the additional federal income taxes assessed against the Appellant for the years 1941, 1942 and 1943 in the

total sum of six thousand three hundred twenty-five dollars ($6,325.00), plus the 50% penalty thereon for said years in the total sum of three thousand one hundred sixty-two dollars fifty-one cents ($3,162.51).

The Appellant duly filed his complaint in said United States District Court. (Tr. 4-13.)

The Appellee duly filed a motion to dismiss (Tr. 14-15), together with a memorandum of points and authorities (Tr. 16-18), which motion was denied. (Tr. 36.) Thereupon, the Appellee duly filed an answer. (Tr. 18-32.)

Following a hearing on said complaint and in pursuance of an oral ruling, an order sustaining motion to dismiss (Tr. 36-40) was duly filed and a judgment duly entered thereon. (Tr. 32-33.)

Appellee duly filed his notice of appeal. (Tr. 33, 34.)

Upon the death of said Fred H. Kanne, Henry Robinson, the Acting United States Collector of Internal Revenue for the District of Hawaii, was duly substituted as the Appellee in said cause (Tr. 157-160) and an order enjoining collection of taxes during pendency of appeal entered. (Tr. 162.) Subsequently, James M. Alsup, the United States Collector of Internal Revenue for the District of Hawaii, was duly substituted as the said Appellee and as the party restrained in said order enjoining collection of taxes during pendency of appeal.

Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was taken and perfected pursuant to Section 225, 28 USCA.

STATEMENT OF THE CASE.

At the hearing of the complaint of the Appellant in the United States District Court of Hawaii, the Appellee renewed his motion to dismiss (Tr. 53) which was denied. (Tr. 56.) Then the Appellee moved for judgment on the pleadings (Tr. 56) which was also denied. (Tr. 61.)

Thereupon, at said hearing, the Appellant introduced evidence to the following effect:

The Appellant was a subject of Japan with limited education in the English language (Tr. 71-72) who operated a service station at Waiau, Oahu, Territory of Hawaii (Tr. 73), which was less than a quarter of a mile from Pearl Harbor, Oahu, Territory of Hawaii. (Tr. 143.)

Sometime during 1944, three men from the United States Bureau of Internal Revenue came to his place of business at said Waiau to investigate. (Tr. 82-83.) In the course of said investigation, one of said men discovered a mis-entry in the Appellant's book in the sum of one hundred fifty dollars ($150.00) (Tr. 87) and told the Appellant that he could be interned for such a mistake, and, thereafter, constantly reminded the Appellant during said investigation of such possibility. (Tr. 88.)

At the request of one of said men, Mr. Irey, Appellant went to said Mr. Irey's office where the Appellant was asked to and did sign a statement to the effect that he had defrauded the United States Government in taxes. The Appellant was permitted to sign said statement although the Appellant failed to understand

the nature and significance of said statement. (Tr. 91, 92.)

Subsequently, three other men from the United States Bureau of Internal Revenue came to the Appellant's place of business at said Waiau and advised him to retain a lawyer. (Tr. 93, 94.) Following said advice, the Appellant secured the services of Mr. Kashiwa, an attorney-at-law (Tr. 94) who also could practice before the United States Treasury Department. (Tr. 153.)

Finally, two men from the United States Bureau of Internal Revenue came to the Appellant's place of business at said Waiau to have the Appellant sign Forms 870, a copy of which was introduced in evidence. (Plaintiff's Exhibit F, Tr. 173-175.) The Appellant inquired of said men what said forms were for, and told them that he didn't understand the nature and significance of said forms, and that he wished to see his lawyer, Mr. Kashiwa, before signing said forms. The Appellant was told by said men that said forms concerned his taxes and that unless he signed said forms immediately he would thereby incur the wrath of the boss and thereby possibly suffer a jail term or a huge fine. Whereupon, the Appellant signed said forms. (Tr. 132-133.) Said Forms 870 which the Appellant signed were in blank forms, there being no figures whatsoever entered on said forms. (Tr. 95.)

The following day, the Appellant saw Mr. Kashiwa, his lawyer, and told him about the signing of said Forms 870. Immediately thereupon, said Mr. Kashiwa went to see Mr. Glutsch of the United States Bureau

of Internal Revenue who informed said Mr. Kashiwa that said Forms 870 had already been mailed to Washington, D. C. (Tr. 148, 149.) Said Mr. Kashiwa then wrote to the Commissioner of Internal Revenue in Washington, D. C., but to no avail. (Tr. 150-152.)

As the consequence of said signing of said Forms 870, the Appellant was assessed the total sum of six thousand three hundred twenty-five dollars ($6,325.00) as additional federal income taxes for the years 1941, 1942 and 1943, plus three thousand one hundred sixty-two dollars and fifty-one cents ($3,162.51) as penalties therefor.

The Appellant was and is in no position whatsoever to pay said taxes and penalties. (Plaintiff's Exhibit D, Tr. 145, 146.)

Upon the close of the Appellant's case, the Appellee renewed his motion to dismiss. (Tr. 171.) The motion was granted on the ground that Section 3653(a), 26 USCA, prohibited the United States District Court for the District of Hawaii from entertaining the suit brought by the Appellant. In ruling as aforesaid, it was held that the judicial exception to the application of said Section 3653 (a) required not only the showing of extraordinary and exceptional circumstances but also required the showing of the illegality of the tax and that the Appellant had failed to show such illegality of the tax. (Tr. 177-178.) An exception was duly taken by the Appellant to the said granting of said motion. (Tr. 183.)

Immediately upon the granting of said motion, the Appellant moved to re-open his case to introduce evi-

dence to show that he did not owe the United States Government any additional income taxes for the years 1941, 1942 and 1943, but it was denied on the ground that it involved the computation of taxes which was of no concern of said Court. An exception was duly taken by the Appellant to said denial. (Tr. 178, 179.)

SPECIFICATIONS OF ERROR.

1. That the trial judge of the United States District Court for the District of Hawaii erred in granting to the Appellee the motion to dismiss on the ground that Section 3653 (a), 26 USCA, prohibited said United States District Court from entertaining the suit brought by the Appellant.

2. That the trial judge of the United States District Court for the District of Hawaii erred in denying the Appellant's request to re-open the case to introduce evidence to show that the Appellant did not owe the United States Government any additional federal income taxes for the years 1941, 1942 and 1943 on the ground that since it involved the computation of taxes it was of no concern of said United States District Court.

SUMMARY OF ARGUMENT.

1. That the judicial exception to the application of Section 3653 (a), 26 USCA, does not require the showing of the illegality of the tax.

2. That, assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, does require the showing of the illegality of the tax, the Appellant did, by sufficient and competent evidence, show such illegality of the tax.

3. That, assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, does require the showing of the illegality of the tax, the Appellant was erroneously prevented by the trial judge of the United States District Court for the District of Hawaii from showing such illegality of the tax.

4. That the Appellant, by sufficient and competent evidence, showed the extraordinary and exceptional circumstances required by the judicial exception to the application of Section 3653 (a), 26 USCA.

ARGUMENT.

1. THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES NOT REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX.

It is well settled that Section 3653(a), 26 USCA, which reads as follows:

> "Section 3653. Prohibition of Suits to Restrain Assessment or Collection.
>
> "(a) Tax. Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

does not absolutely prohibit a federal court from entertaining a suit to restrain the assessment or collection of a federal tax. An exception to the application of said Section 3653 (a) was created by judicial decision. *Allen v. Regents of the University System of Georgia* (1938), 82 L. Ed. 1448, 58 S. Ct. 980, 304 U. S. 439; *Miller v. Standard Nut Margarine Co. of Florida* (1932), 76 L. Ed. 422, 52 S. Ct. 260, 284 U. S. 498; *Hill, Jr., et al. v. Wallace, et al.* (1922), 66 L. Ed. 822, 42 S. Ct. 453, 259 U. S. 44.

It is submitted that the said judicial exception to the application of the said Section 3653 (a) merely requires the showing of extraordinary and exceptional circumstances and does not require the showing of the illegality of the tax.

In *Snyder v. Marks* (1883), 27 L. Ed. 901, 902, 903, 3 S. Ct. 157, 109 U. S. 189, the United States Supreme Court held as follows:

> "In the Revised Statutes this amendment of and addition to Section 19 of the Act of 1866 is made a section by itself (Section 3224), separated from that of which it is an amendment and to which it is an addition, and reads thus: 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' The word 'any' was inserted by the reviser. This enactment in section 3224 has a no more restricted meaning that it had when, after the Act of 1867, it formed a part of section 19 of the Act of 1866, by being added thereto. The first part of section 19 related to a suit to recover back money paid for a tax alleged to have been errone-

ously or illegally assessed or collected, and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended, to say that 'No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.' The addition of 1867 was in pari materia with the previous part of the section and related to the same subject matter. The tax spoken of in the first part of the section was called a tax sub modo, but was characterized as a 'tax alleged to have been erroneously or illegally assessed or collected.' *Hence, when, in the addition to the section, a tax was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in section 3224. There is, therefore, no force in the suggestion that section 3224, in speaking of a tax means only a legal tax, and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.*" (Italics ours, and Revised Statutes, Section 3224, is substantially Section 3653 (a), 26 USCA.)

In view of the said *Snyder* case, it is rather significant that the United States Supreme Court merely held that the said Section 3653 (a) did not apply in extraordinary and exceptional circumstances.

> "This court has given effect to Section 3224 in a number of cases. * * * It has never held the rule to be absolute, but has separately indicated that extraordinary and exceptional circumstances

render its provisions inapplicable." *Miller v. Standard Nut Margarine Co. of Florida* (1932), 76 L. Ed. 422, 430, supra.

"It has been held by this court, in *Dodge v. Brady,* 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 S. Ct. Rep. 277, that Section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable." *Hill, Jr., et al. v. Wallace, et al.* (1922), 66 L. Ed. 822, 827, supra.

In view of the foregoing cases, it is submitted that the United States Supreme Court did not intend that the judicial exception to the application of the said Section 3653 (a) shall require the showing of the illegality of the tax.

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2. THAT, ASSUMING THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX, THE APPELLANT DID, BY SUFFICIENT AND COMPETENT EVIDENCE, SHOW SUCH ILLEGALITY OF THE TAX.

Assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, requires the showing of the illegality of the tax, it is submitted that the Appellant, by sufficient and competent evidence, did show such illegality of the tax.

The Appellant testified to the effect that on a day certain, two men from the United States Bureau of

Internal Revenue came to his place of business at Waiau, Oahu, Territory of Hawaii (Tr. 94), with Forms 870, a copy of which was introduced in evidence. (Plaintiff's Exhibit F, Tr. 173-175.) Said men wanted the Appellant to sign said forms immediately. (Tr. 94, 95.) The Appellant failing to understand the nature and significance of said forms (Tr. 95) told said men that he didn't understand the nature and significance of said forms, that he wanted to see Mr. Kashiwa, his lawyer, before signing any of said forms. (Tr. 132.) Said Mr. Kashiwa, an attorney at law, who also could practice before the United States Treasury Department (Tr. 153), had been retained by the Appellant upon the advice of some men from the United States Bureau of Internal Revenue. (Tr. 93, 94.) Said men with said forms merely stated to the Appellant that said forms concerned his tax cases (Tr. 132), then told the Appellant that unless he signed said forms then and there he would incur the wrath of the higher up, thereby possibly becoming liable to a jail term or a huge fine. (Tr. 94, 95.) Under said circumstances, the Appellant finally signed said Forms 870. Said Forms 870 signed by the Appellant had no figures whatsoever thereon. They were in blank forms. (Tr. 95.)

As the consequence of signing said Forms 870, the Appellant was assessed for the years 1941, 1942 and 1943, additional federal income taxes and penalties thereon, in the total sum of nine thousand four hundred eighty-seven and fifty-one cents ($9,487.51). (Tr. 95, 96.)

It is submitted that the said conduct of the said men was arbitrary and capricious. In fact, the trial judge intimated so much. (Tr. 178.)

It is submitted that the said taxes assessed in consequence of said arbitrary and capricious conduct of said men were illegal, and that the showing thereof was a showing of the illegality of the tax as required by the judicial exception to the application of the said Section 3653 (a).

> "These enactments forbid in sweeping language the issuance of an injunction to restrain the collection of a tax which is assessed under color of office and *without arbitrary or capricious conduct.*" (Italics ours, and Court here was speaking about Section 3224.) *Burke v. Mingori et al.* (CCA, 10th Circuit, 1942), 128 F. (2d) 996, 997.

> "The Commissioner is therein empowered to determine the taxable status of persons handling denatured alcohol. His right to do so may not be restrained by a suit to enjoin the collection of the tax so assessed, *provided that he does not act arbitrarily or capriciously.*" (Italics ours, and speaking about Section 3224.) *Jacoby et al. v. Hoey* (CCA, 2nd Circuit, 1936), 86 F. (2d) 108, 109, certiorari denied, 57 S. Ct. 315, 299 U. S. 613, 81 L. Ed. 452.

3. THAT, ASSUMING THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX, THE APPELLANT WAS ERRONEOUSLY PREVENTED BY THE TRIAL JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FROM SHOWING SUCH ILLEGALITY OF THE TAX.

After the Appellant had rested his case, the Appellant moved to reopen his case to introduce evidence to show that for the years 1941, 1942 and 1943, the Appellant owed the United States Government no additional federal income taxes. (Tr. 178.) The trial judge of the United States District Court for the District of Hawaii denied it on the ground that it involved the computation of the tax which was of no concern of said United States District Court. (Tr. 178.)

It is submitted that the showing that the Appellant, for the years 1941, 1942 and 1943, owed the United States Government no additional federal income taxes, is a showing of the illegality of the taxes assessed against the Appellant as additional federal income taxes for said years, and that that is a showing of the illegality of the tax as required by the judicial exception to the application of said Section 3653 (a).

> "We think Section 3653, I. R. C. applies except in a case wherein it is shown, in addition to the fundamental allegations necessary to obtain injunctive relief, *that under no possibility could the attempted exaction be held legal* * * * or in the unusual and extraordinary circumstances such as confronted the court in *Graham v. Dupont,* 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965, and in

Allen v. Regents, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448." (Italics ours.) *Matcovich v. Nickell* (CCA, 9th Circuit, 1943), 134 F. (2d) 837, 838.

"When it is made to appear that the rights and property of an alleged taxpayer will be utterly destroyed if he is compelled to pay a *tax that is not in fact his obligation* and the pursuit of his remedy by suit for the recovery will not adequately restore to him that which he has lost, a court of equity may take jurisdiction to grant relief in advance of payment notwithstanding the prohibition in Section 3653." (Italics ours.) *Midwest Haulers, Inc., et al. v. Brady* (CCA, 6th Circuit, 1942), 128 F. (2d) 496, 499.

It is submitted that even if it involved the computation of the taxes, the trial judge of said United States District Court should have permitted the Appellant to introduce evidence to show that for the years 1941, 1942 and 1943, the Appellant owed the United States Government no additional federal income taxes, thereby showing the illegality of the additional federal income taxes assessed against the Appellant for said years, and thereby showing the illegality of the tax as required by the judicial exception to the application of said Section 3653 (a).

4. THAT THE APPELLANT, BY SUFFICIENT AND COMPETENT EVIDENCE, SHOWED THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES REQUIRED BY THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA.

It is submitted that the Appellant, by sufficient and competent evidence showed the extraordinary and exceptional circumstances as required by the judicial exception to the application of Section 3653 (a), 26 USCA.

In *Allen v. Regents of the University System of Georgia* (1938), 82 L. Ed. 1448, 1456, supra, the United States Supreme Court said:

> "What we have said indicates that Rev. Stat. Section 3224, supra, does not oust the jurisdiction. The statute is inapplicable in *exceptional cases where there is no plain, adequate, and complete remedy at law.*" (Italics ours.)

Furthermore, it was held in *Kingan & Co., Inc. v. Smith* (1936), 16 F. Supp. 549, that:

> "A remedy at law, in order that it may be adequate, must be plain, complete and beyond doubt. As was said by the Supreme Court, in the case of *Davis v. Wakelee,* 156 U. S. 680, 15 S. Ct. 555, 558, 39 L. Ed. 578: 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' "

The Appellant testified as to signing Forms 870 which were in blank forms, and as the consequence thereof to being assessed the total sum of nine thousand four hundred eighty-seven dollars and fifty-one cents ($9,487.51) as additional federal income taxes and penalties thereon for said years. (See Argument 2.)

It was shown that the Appellant was and is in no position whatsoever to pay said total sum. (Plaintiff's Exhibit D, Tr. 145, 146.)

It is submitted, that under the circumstances, the Appellant's remedy at law, if any, was at best doubtful and uncertain.

CONCLUSION.

In conclusion, the Appellant contends that, in view of the foregoing argument, the trial judge of the United States District Court for the District of Hawaii erred, to the prejudice of the Appellant, in granting the motion to dismiss to the Appellee on the ground that Section 3653 (a), 26 USCA, prohibited the maintenance of Appellant's suit in the said United States District Court, and that the said trial judge erred, to the prejudice of the Appellant, in denying the Appellant's request to reopen his case to introduce evidence to show that the Appellant owed the United States Government no additional federal income taxes for the years 1941, 1942 and 1943.

Therefore, it is respectfully submitted that the judgment of the said trial judge should be reversed.

Dated, Honolulu, T. H.,
October 24, 1947.

MITSUKIYO YOSHIMURA,
Appellant,
By SHIRO KASHIWA,
His Attorney.

No. 11584

In the United States Circuit Court of Appeals for the Ninth Circuit

MITSUKIYO YOSHIMURA, APPELLANT

v.

JAMES M. ALSUP, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF HAWAII, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR THE APPELLEE

THERON LAMAR CAUDLE,
Assistant Attorney General.

GEORGE A. STINSON,
LEE A. JACKSON,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

RAY J. O'BRIEN,
United States Attorney.

EDWARD A. TOWSE,
Assistant United States Attorney.

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CITATIONS

769833—47——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,584

MITSUKIYO YOSHIMURA, APPELLANT

v.

JAMES M. ALSUP, COLLECTOR OF INTERNAL REVENUE,[1] FOR THE DISTRICT OF HAWAII, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court filed no opinion on rendering the judgment appealed from.

JURISDICTION

This is an appeal from the judgment of the District Court entered on January 16, 1947 (R. 32–33), granting the Collector's motion to dismiss the taxpayer's complaint at the conclusion of the taxpayer's

[1] The action was originally commenced against Fred H. Kanne, Collector of Internal Revenue; upon his death, the action was continued against his successor, Henry Robinson, Acting Collector, for whom was substituted the present appellee upon his appointment as Collector.

presentation of his evidence in this case. The complaint prayed that certain assessments of income tax deficiencies and penalties for the years 1941, 1942 and 1943 totalling $9,487.51 be vacated and that the Collector be permanently enjoined from collecting those taxes. (R. 10.) The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended. (R. 4.) Notice of appeal to this Court was filed on January 17, 1947. (R. 33–34.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Has the District Court jurisdiction of a suit to enjoin the collection of internal revenue taxes, despite the provisions of Section 3653 of the Internal Revenue Code, which prohibits the maintenance of such a suit?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) *Tax.*—Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 3653.)

STATEMENT

The complaint (R. 4–10) alleges the following:

In the latter part of 1944 or early in 1945 an in-

vestigator of the Bureau of Internal Revenue visited the business premises of the taxpayer at Waiau, Territory of Hawaii, and demanded that he be permitted to examine the taxpayer's books. After examining his books, the investigator informed the taxpayer that he had defrauded the United States Government of thousands of dollars in taxes and that if the taxpayer did not sign a statement admitting this fraud, the taxpayer, a subject of an enemy country, would be in a very precarious position and would possibly be interned. As taxpayer had little education and had never fully mastered the English language he did not understand the meaning of the word fraud, and because Japanese alien residents of Hawaii at that time were being interned and imprisoned in large numbers for unexplained reasons by a military government the taxpayer feared he would be interned. So he signed the statement. The statement was not signed of his own free will but because of his fear of being interned. (R. 5–7.)

During the latter part of 1945 or early in 1946, investigators from the Bureau of Internal Revenue visited the taxpayer and requested that he sign three forms called "Form 870", a copy of which is attached to the complaint and marked Exhibit A, waiving any and all restrictions upon the assessment and collection of deficiencies in his income taxes for the years 1941, 1942 and 1943. (R. 7.)

The taxpayer told these investigators that he had consulted an attorney regarding his income tax matters and that, as he had been advised not to sign any papers without his attorney's approval, he wanted to see his attorney before signing any papers. The

investigators told the taxpayer that an attorney was not necessary and that since he had signed a statement admitting fraud, he was in a very dangerous position and they cited examples of federal income tax evaders who had been imprisoned. Under these circumstances the taxpayer signed the waivers. (R. 7–8.)

Immediately after signing these waivers the taxpayer consulted his attorney who went to the office of the Internal Revenue Agent and requested that the waiver forms be returned. The attorney was informed that the waivers had been mailed to Washington. The taxpayer's attorney wrote to the Bureau of Internal Revenue at Washington requesting consideration of the matter but this request was refused. (R. 8–9.)

As a result of signing the waivers, the taxpayer received from the Collector a tax bill for deficiencies and penalties amounting to $9,487.51, for which immediate payment was demanded. (R. 9.)

The taxpayer has not this amount in cash and if the Collector is permitted to seize and sell his properties the taxpayer will be irreparably damaged as he has no plain, adequate or complete remedy at law. (R. 9–10.)

Upon these allegations the taxpayer prayed that the assessments be vacated; that the Collector be permanently enjoined from collecting the taxes assessed and that he be granted such other relief as might be just and equitable. (R. 10.)

The Collector filed a motion to dismiss (R. 14–15) upon the grounds (1) that the court was without

jurisdiction of the subject matter of the suit and (2) that the complaint failed to state a claim.

This motion to dismiss was denied.[2]

The Collector then filed an answer generally denying the allegations of the complaint and alleging as defenses the grounds previously urged for dismissal. (R. 18–30.)

The issues raised by the complaint and answer were tried by the District Court which, at the conclusion of the taxpayer's case, dismissed the complaint upon the ground that the taxpayer had failed to make out a case within any exception to the prohibition against suits to enjoin taxes found in Section 3653 of the Internal Revenue Code. (R. 39, 178.)

SUMMARY OF ARGUMENT

Section 3653 of the Internal Revenue Code prohibits the maintenance in any court of any suit to enjoin the collection of taxes. Congress has provided a complete system of corrective justice under the revenue laws, based upon the idea of appeals within the executive departments. If a party aggrieved does not obtain satisfaction in this manner, suit may then be brought, but only after payment of the tax.

The complaint fails to allege and the taxpayer failed to prove any special and extraordinary circumstances to bring this case within any exception to the prohibition. The taxpayer here is resisting payment of taxes solely upon the ground that he does not

---

[2] The record contains no copy of an order denying this motion. The statement that it was denied appears in the order sustaining the motion to dismiss. (R. 36–37.)

owe them. He does not contend that the law under which they were assessed is unconstitutional or that he could by no legal possibility be subject to a tax under it.

ARGUMENT

The District Court correctly held that it was without jurisdiction to entertain the suit

Section 3653 of the Internal Revenue Code, *supra,* prohibits the maintenance in any court of any suit for the purpose of restraining the assessment and collection of any federal tax.[3] *Graham* v. *duPont,* 262 U. S. 234; *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Osborn,* 240 U. S. 118; *Snyder* v. *Marks,* 109 U. S. 189; *Cheatham* v. *United States,* 92 U. S. 85; *State Railroad Tax Cases,* 92 U. S. 575. In *State Railroad Tax Cases, supra,* it is pointed out (pp. 613–614) that the Government has provided a complete system of corrective justice covering internal revenue taxes, founded upon the idea of appeals within the executive departments. If satisfaction is not obtained through that means, suit will lie against the collecting officer but only unless the tax is paid.

---

[3] Insofar as income taxes are concerned, the only statutory exception to the prohibition of Section 3653, *supra*, is contained in Section 272 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 272). The taxpayer, in his brief in this Court, makes no contention that this statutory exception applies to this case, but places sole reliance upon the so-called judicial exception to the application of Section 3653. Moreover, not only had the taxpayer waived, as provided in Section 272 (d) of the Code, the restrictions provided in Section 272 (a) on assessment and collection of the deficiency, but the complaint filed in this case contains no allegation that the Commissioner had not sent a notice of deficiency to the taxpayer in accordance with the provisions of Section 272 (a).

Exception to the prohibition of the statute has been made in those rare cases where the taxpayer shows, in addition to the illegality of the exaction in the guise of a tax, exceptional and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence. *Dodge* v. *Brady,* 240 U. S. 122, 126; *Miller* v. *Nut Margarine Co.,* 284 U. S. 498; *Allen* v. *Regents,* 304 U. S. 439; *Burke* v. *Mingori,* 128 F. 2d 996 (C. C. A. 10th); *Sturgeon* v. *Schuster,* 158 F. 2d 811 (C. C. A. 10th).

In *Miller* v. *Nut Margarine Co., supra,* the scope of the exception was stated by the Court as follows (p. 510):

> This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force. *LeRoy* v. *East Saginaw Ry. Co.,* 18 Mich. 233, 238–239. *Kissinger* v. *Bean,* Fed. Cas. 7853. * * *

The District Court was of the opinion that while the taxpayer's proof, if viewed in the most favorable light might make out a case of exceptional and extraordinary circumstances, the taxpayer's liability for the tax was at least arguable and he had not brought himself within the exception. (R. 39.)

The basis of the taxpayer's complaint is that he signed waivers of the restrictions upon assessment of the income taxes here in question under the compulsion of threats made to him by revenue agents.

(R. 6–7.) In his testimony the taxpayer sought to expand the allegations of his complaint with the claim that he was not informed and that he did not understand what he was signing at all. (R. 132.) The record does not support the taxpayer's claim that he was unfamiliar with the English language and was ignorant of what he was doing as throughout the record shows the taxpayer's ready understanding of all interrogatories propounded to him and Exhibit C (R. 90) shows that he wrote an excellent hand. The complaint makes no claim that the taxpayer did not understand what he was signing; it goes no further than to allege that the pressure of the revenue agents induced the taxpayer to sign these waivers (and they are described as waivers in the complaint) without the benefit of counsel. Cf. *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295, 303.

The taxpayer's testimony is that he immediately after signing the waivers consulted his lawyer. (R. 132.)

The taxpayer's lawyer, who was his counsel in the District Court and is his counsel here, wrote to Washington regarding the waivers. (R. 149.) His letter does not appear in the record although a copy of it was submitted to the court and was offered. (R. 149.)

It is clear, however, from the reply of the Deputy Commissioner of Internal Revenue (Pltf. Ex. E, R. 151) that the taxpayer did not immediately consult his attorney as the attorney's letter was dated April 29, 1946, while the Bureau of Internal Revenue on March 26, 1946, had advised the taxpayer that assessment would be made immediately in accordance with the agreement, i. e., the waiver. It is also clear from

the Deputy Commissioner's letter that the taxpayer's attorney did not assert that the waivers were procured from the taxpayer by coercion—he simply stated that the taxpayer did not understand the agreement signed by him and that he did not owe the tax in question.

The taxpayer's attorney characterized the letter himself as a request to the Commissioner to open the whole case. (R. 150.)

The allegations and the proof fail to show that a valid tax could by no legal possibility be asserted against the taxpayer (*Miller* v. *Nut Margarine Co.*); they simply tend to show that the taxpayer does not owe the tax. That such a case is not within the exception to Section 3653 of the Internal Revenue Code was recently held in *Burke* v. *Mingori, supra,* where the court, on reversing a judgment granting a permanent injunction, said (p. 997):

> Neither are extraordinary circumstances present. It is a case of complainants resisting a tax which they contend they do not owe. Investigators of the Alcohol Tax Unit made an investigation into the question whether complainants had been interested with others in the manufacture of distilled spirits, and the assessment was based upon information obtained in that manner. In other words, the Commissioner determined that they had been interested in the manufacture of such spirits. They deny any such interest and therefore assert that they are not liable for the tax. It may be that they did not have the interest and hence are not liable for the tax. But that issue of fact is subject to judicial determination only in a suit for refund. It cannot be ad-

> judicated in an action to enjoin the Collector from collecting the tax. * * *

The District Court stated (R. 38) that the taxpayer's evidence was "not too clear or satisfying" but even if the allegations of the complaint and the taxpayer's brief are to be indulged with every favorable inference the only injury sustained by the taxpayer has been the loss of his right to appeal to the Tax Court (R. 10).

Under the circumstances, if the taxpayer had refused to sign waivers of the restriction upon assessment and collection after having previously signed a statement admitting cheating the Government in regard to income taxes (R. 127), the Commissioner clearly would have been justified in making a jeopardy assessment against him under Section 273 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 273). If this had been done, it is true that the taxpayer still would have had his right of appeal to the Tax Court but collection of the assessment could only have been stayed by his giving adequate security for payment of the whole amount. If the judgment of the District Court is affirmed and the security which the taxpayer has given to stay collection (R. 163–165) is applied to the payment of the assessments, the ordinary mode of obtaining a refund of the taxes thus paid is still open to the taxpayer if he persists in his assertion that these taxes were erroneously and illegally assessed and collected. He is thus actually in no worse position now than if a jeopardy assessment had been made.

CONCLUSION

The judgment of the District Court is right and should be affirmed.

Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.
GEORGE A. STINSON,
LEE A. JACKSON,
FREDERIC G. RITA,
Special Assistants to the Attorney General.
RAY J. O'BRIEN,
United States Attorney.
EDWARD A. TOWSE,
Assistant United States Attorney.

DECEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. H. McCLINTOCK and FLORENCE L. McCLINTOCK, copartners, doing business under the fictitious name and style of McCLINTOCK DISPLAY COMPANY,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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INDEX TO EXHIBITS

Plaintiff's Exhibits:

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California

Central Division

No. 5114-O'C Civ.

L. H. and FLORENCE L. McCLINTOCK d.b.a. McCLINTOCK DISPLAY CO., a copartnership,

Plaintiffs,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Defendant.

COMPLAINT FOR REFUND OF EXCISE TAX

Come now the plaintiffs in the above entitled action and for cause of action against the defendant, complain and allege:

I.

That at all times herein mentioned, plaintiffs were and now are copartners doing business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious firm name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law. [2]

II.

That the defendant herein was the Collector of Internal Revenue for the Sixth District of California from the first day of July, 1943, to the date of filing of this action; and that the tax sued for herein was paid to him

in his official capacity as such Collector of Internal Revenue.

III.

That the question involved herein is one arising under the laws of the United States of America, providing for internal revenue and more specifically Section 3444 of the Internal Revenue Code.

IV.

That at all times herein mentioned plaintiffs have been and now are engaged in the business of manufacturing a decorative rubber leaf with the appearance of parsley, for use as a decoration in meat and vegetable display cases; that plaintiffs also were at all times herein mentioned and now are engaged in and operate a display service business in which they use certain quantities of the decorative rubber leaf manufactured by them; that said display service business consists of delivering and installing in markets varying quantities of said decorative rubber leaf, of picking up the said rubber leaf when the same becomes soiled, of replacing such soiled units with new or renovated units, of renovating said soiled units and of maintaining a stock of new and renovated units, for which service plaintiffs made varying charges.

V.

That in certain areas where plaintiffs did not engage in the display service business they sold their product to meat and vegetable dealers at 34½ Cents per 18 inch unit; that during the period from October 1, 1941, to October 31, 1942, said plaintiffs sold $12,710.23 worth of their product to meat and vegetable dealers and used $28,115.80 worth thereof in their display service business, the value

of the product used in the display service business was computed at 34½ Cents per 18 inch unit, plaintiffs' regularly established wholesale selling price. [3]

VI.

That on or about the 10th day of March, 1943, the Commissioner of Internal Revenue on the Miscellaneous List for January 1943, page 6172-5, assessed the sum of $22,507.23, plus $5,417.54, and $1,001.54, against the plaintiffs to cover tax, penalty and interest respectively on the sale of articles manufactured from rubber, and on the total income derived from use of articles so manufactured in connection with the display service business operated by plaintiffs.

VII.

That on or about the 26th day of January, 1944, plaintiffs paid to Harry C. Westover, the Collector of Internal Revenue for the Sixth District of California, $22,507.23, and $2,248.37, to cover tax and interest respectively, as demanded by said Collector of Internal Revenue; that on or about the 24th day of December, 1943, the Commissioner of Internal Revenue abated the penalty included in the assessment referred to in Paragraph VI hereof in the amount of $5,417.54.

VIII.

That on or about the 13th day of October, 1944, the plaintiffs herein filed their claim for refund, a copy of which is attached hereto, marked Exhibit "A", and by this reference incorporated herein as fully as though set forth herein in full, in the sum of $20,673.38, covering a portion of the tax and interest paid on the above assessment, with Harry C. Westover, the Collector of Internal Revenue for the Sixth District of California, at his office

in the City of Los Angeles, State of California; that said claim for refund was filed on official form 843, within the time and in the manner provided by law.

IX.

That on or about the 16th day of April, 1945, the Commissioner of Internal Revenue of the United States, rejected and disallowed plaintiffs' said claim for refund.

X.

That plaintiffs were taxable upon the use of all rubber leaf used in connection with the display service business operated by them in accordance with [4] Section 3444 of Internal Revenue Code and Section 316.7 of Regulations 46 promulgated thereunder; that sales of rubber leaf on the open market and the value of rubber leaf used in connection with plaintiffs' display service business during the period from the first day of October, 1941, to the 31st day of October, 1942, and the tax computed thereon, were as follows:

	Net Taxable Amount Tax Included		Tax Due On		
Date 1941	Sales to Others per Revenue Agent	Sales to Rental Department	Sales to Others per Revenue Agent	Sales to Rental Department	Total
October	$ 687.85	$ 7,354.02	$ 62.53	$ 668.55	$ 731.08
November	507.33	6,019.22	46.12	547.20	593.32
December	561.82	3,976.13	51.07	361.47	412.54
1942					
January	293.06	5,696.64	26.64	517.88	544.52
February	194.91	2,016.87	17.72	183.35	201.07
March	86.17	119.03	7.83	10.82	18.65
April	72.12	582.02	6.56	52.91	59.47
May	45.00	50.72	4.09	4.61	8.70
June	162.04	2,301.15	14.73	209.20	223.93
July	254.39		23.13		23.13
August	2,936.37		266.94		266.94
September	4,820.15		438.20		438.20
October	2,089.02		189.91		189.91
	$12,710.23	$28,115.80	$1,155.47	$2,555.99	$3,711.46

XI.

That the Commissioner of Internal Revenue has illegally and unlawfully taxed plaintiffs on the total income received from the operation of their display service business during the period from the first day of October, 1941, to the 31st day of October, 1942, in the amount of $18,-795.77, together with inter- [5] est thereon in the sum of $1,877.61.

XII.

That plaintiffs did not increase their prices to include the tax sued for herein and did not collect it from their customers either directly or indirectly.

Wherefore, plaintiffs pray for judgment against defendant in the sum of $20,673.38, together with interest thereon from date of payment and for such other and further relief as the Court deems fitting and proper.

RILEY AND HALL

By Richard K. Yeamans

Attorneys for Plaintiffs [6]

EXHIBIT "A"

Form 843

Treasury Department

Internal Revenue Service

(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of Tax Illegally Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss:

[Type or Print]

Name of taxpayer or purchaser of stamps L. H. Mc Clintock and Florence L. McClintock, d.b.a. McClintock Display Co., a Partnership

Business address

3044 Riverside Drive	Los Angeles	California
(Street)	(City)	(State)

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of

the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th District California
2. Period (if for income tax, make separate form for each taxable year) from October 1, 1941, to October 31, 1942
3. Character of assessment or tax Excise taxes, rubber articles, Sec. 3406 (a) (7) Internal Revenue Code
4. Amount of assessment, $24,755.60; dates of payment 1-26-44
5. Date stamps were purchased from the Government .....
6. Amount to be refunded $20,673.38
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section ..... of the Revenue Act of 19....., on ....., 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached

(Attach letter-size sheets if space is not sufficient)

McCLINTOCK PRODUCT

Signed McCLINTOCK DISPLAY CO.,
a Partnership.

By L. H. McClintock

By Florence L. McClintock

Sworn to and subscribed beforee me this 5th day of October, 1944

(Seal) R. C. Garcia

(Signature of officer administering oath)

Notary Public in and for the County of Tulare, State of California (Title)

The above Claim for Refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

John T. Riley [7]

The McClintock Display Co. is a partnership owned and operated by L. H. and Florence L. McClintock since December, 1934. Since its organization it has been engaged in the business of renting and selling a decorative leaf. Prior to April 13, 1937, the company purchased from W. J. Voit Rubber Corporation, 2616 Nevin Avenue, Los Angeles, California, rubber manufactured for its particular use. This rubber consisted of pure pale crepe rubber processed in the color of green and was formed into a thin rubber ribbon four inches wide. It ranged in cost from 31¢ to 39¢ per pound.

About April 13, 1937, the company, in order to have a better product, began to purchase pure crepe rubber in bales direct from the Dutch East Indies through C. P. Hall Company, Los Angeles. The company takes this rubber strip and runs it through a machine which makes an irregular cut through the middle of the rubber strip. When separated the rubber then has a leaf effect. Two or more thicknesses of this strip are then sewn together and inserted in a galvanized strip. These strips range from 12

to 24 inches in length. The strips are then given a treatment that gives a bright green color to them.

Taxpayer then rented these strips to butcher shops and markets and others for displaying meats and vegetables. The taxpayer's service consisted of installing this rubber leaf in the markets. It serviced these displays by picking up same when soiled which ranged from two to four months. The soiled units were replaced with clean display units. The units picked up were brought to taxpayer's factory where they were washed and freshened up with a lacquer and again used for replacing.

In certain areas which the taxpayer did not service directly, it made outright sales to butcher supply houses and retail meat markets. The taxpayer rented the rubber leaf to chain stores for an average price of approximately 5¢ for an 18 inch unit per month. The rentals charged to independent stores and small users was on an average of 7¢ per 18 inch unit. In the eastern section of the United States, the taxpayer had representatives to whom he shipped a supply of the rubber leaf and charged them a flat price of from 4¢ to 4½¢ a [8] unit. These representatives rented the leaf for such prices per unit as they desired. All soiled units were shipped back to the taxpayer in Los Angeles where same was washed and freshened up and the eastern representatives were furnished with cleaned units. The average life for the leaf is approximately four years, although the taxpayer has some leaf in service of a longer life.

As of October 1, 1941, the taxpayer had on hand 538 new units which were manufactured prior to October 1, 1941; used units on hand at taxpayer's place of business 160,609; out on rent 302,949 units. On November 1,

1942, the taxpayer had on hand 27,030 new units which were never rented.

There is attached thereto marked "Exhibit A" and by reference made a part hereof, a schedule showing sales in dollars made to others during the period October 1, 1941, to October 31, 1942. There is also shown on this schedule the dollar value of new units on hand October 1, 1941, and of new units produced during the period October 1, 1941, to October 31, 1942, termed "sales to rental department." This dollar value is computed at 34½¢ per 18 inch unit which is the taxpayer's wholesale price and the amount charged to butcher supply houses and independents purchasing at wholesale price. This schedule shows the amount of tax due on these sales and the amount of tax on the units manufactured by the taxpayer during the period computed on the wholesale price.

There is attached hereto marked "Schedule A-1" and by reference made a part hereof, a schedule showing the number of units on hand as of October 1, 1941, and the number produced from October 1, 1941, to June 30, 1942. There was no further production after June 30, 1942, inasmuch as all of the taxpayer's crude rubber on hand was taken over by the Rubber Reserve Corporation on May 1, 1942, and July 28, 1942.

There is attached hereto and marked "Schedule A-2" and by reference made a part hereof, a schedule showing the cost of producing 82,170 units, said number representing the total number produced during the period October 1, 1941, to June 30, 1942. The cost of producing each unit was 20.043¢. [9]

There is attached hereto and marked "Schedule A-3" and by reference made a part hereof, a schedule showing

inventory of new units on hand, used units on hand, number of units on rental, number of units manufactured each month, number of units washed and brightened and number of units sold as of the first of each month from October, 1941, to November, 1942.

The tax covered by this Claim has not been added to the selling price of the articles sold or to the rental price of the articles rented and neither has it been billed as a separate item nor collected directly or indirectly.

The Commissioner has assessed a tax based upon total amounts received by the taxpayer from sales to others and from rental received on both new and old units. It is the contention of the taxpayer that the tax should be computed pursuant to the Provisions of Section 3444 of the Internal Revenue Code and Section 316.7 of Regulations 46:

(1) Upon the sales price received from sales to others, and

(2) Upon the fair wholesale market price on the units produced and used by the taxpayer in connection with his rental business which is at the rate of 34½¢ for each 18 inch unit as shown by Exhibit A and Schedule A-1 attached hereto and by reference made a part hereof.

McCLINTOCK DISPLAY CO., a Partnership
By L. H. McClintock
By Florence L. McClintock

Subscribed and sworn to before me this 5th day of October, 1944.

(Seal) R. C. Garcia
Notary Public in and for the County of Tulare, State of California [10]

Exhibit A

McCLINTOCK DISPLAY CO.

(A Copartnership)

Manufacturer's Excise Tax on Rubber Articles—
Decorative Rubber Leaf

October 1, 1941, to October 31, 1942

	Net Taxable Amount Tax Included		Tax Due On		
Date	Sales to Others per Revenue Agent	Sales to Rental Department Schedule 1	Sales per Revenue Agent	Sales to Rental Department	Total
1941					
October	$ 687.85	$ 7,354.02	$ 62.53	$ 668.55	$ 731.08
November	507.33	6,019.22	46.12	547.20	593.32
December	561.82	3,976.13	51.07	361.47	412.54
1942					
January	293.06	5,696.64	26.64	517.88	544.52
February	194.91	2,016.87	17.72	183.35	201.07
March	86.17	119.03	7.83	10.82	18.65
April	72.12	582.02	6.56	52.91	59.47
May	45.00	50.72	4.09	4.61	8.70
June	162.04	2,301.15	14.73	209.20	223.93
July	254.39		23.13		23.13
August	2,936.37		266.94		266.94
September	4,820.15		438.20		438.20
October	2,089.02		189.91		189.91
	$12,710.23	$28,115.80	$1,155.47	$2,555.99	$3,711.46

Schedule A-1

McCLINTOCK DISPLAY CO.

(A Copartnership)

Sales of New Eighteen Inch Rubber Leaf Decorative Units to Rental Department,

October 1, 1941, to October 31, 1942

Date	Number of Units: Total Produced	Sales to Others	Sold to Rental Department	At Wholesale Unit Price	Amount of Sales to Rental Department
1941					
Inventory, October 1, 1941	538.00)	958.00	21,316.00	.345	$ 7,354.02
October	21,736.00)				
November	17,569.00	122.00	17,447.00	.345	6,019.22
December	11,594.00	69.00	11,525.00	.345	3,976.13
1942					
January	16,512.00		16,512.00	.345	5,696.64
February	5,846.00		5,846.00	.345	2,016.87
March	345.00		345.00	.345	119.03
April	1,727.00	40.00	1,687.00	.345	582.02
May	171.00	24.00	147.00	.345	50.72
June	6,670.00		6,670.00	.345	2,301.15
July					
August		57.00	(57.00)		
September		30.00	(30.00)		
October					
	82,708.00	1,300.00	81,408.00		$28,115.80

Schedule A-2

McCLINTOCK DISPLAY CO.

Cost of New Rubber Leaf Units Manufactured During the Period October 1, 1941, to October 31, 1942

Green Rubber		
Produced during period:		
No. IX Thin Pale Latex Crepe—70 barches of 60 pounds each—4,200 pounds at 21.375¢ per pound	$ 897.75	
Processing—6,600 pounds at 13.5¢ per pound	891.03	
Chemicals—70 batches at $4.93 each	345.10	
Cost of 6,600 pounds of green rubber at 32.33¢ per pound	$ 2,133.88	
Add inventory at beginning—13,812 pounds at 32¢ per pound	4,419.84	
	$ 6,553.72	
Deduct inventory at end—none	—0—	
Green rubber used—20,412 pounds at 32.01¢ per pound		$ 6,553.72
Use tax on rubber used—3% of $897.75		26.93
Metal clips and holders:		
Material purchased	$ 348.57	
Add inventory at beginning	965.91	
	$ 1,314.48	
Deduct inventory at end	141.94	
Metal cost of clips used		1,172.54
Dipping:		
Chemicals purchased	$19,947.96	
Add inventory at beginning	569.77	
	$20,517.73	

Schedule A-2 (Cont'd)

McClintock Display Co.

Cost of New Rubber Leaf Units Manufactured During the Period October 1, 1941, to October 31, 1942

Forwarded			$20,517.73	
Deduct inventory at end			7,904.95	
Material used			$12,612.78	
Allocated to production of new units on the basis of production.				
New units	82,170	7.91%	$ 997.67	997.67
Service units	957,197	92.9	11,615.11	
Total	1,039,367	100.00%	$12,612.78	
Sewing materials				324.40
Direct labor				4,989.79
Manufacturing overhead				2,404.57
Cost of producing 82,170 new units (20.043 cents each)				$16,469.62

[14]

Schedule A-3

McCLINTOCK DISPLAY CO.

Inventory, Production and Sales Statistics for the Period October 1, 1941, to October 31, 1942

	Inventory First of Each Month		Number of Units on Rental First of Each Month	Number of New Units Manufactured During Each Month	Number of Used Units Washed and Brightened each Month	Number of Units Sold to Others Each Month	
	New Units	Used Units				New	Used
October, 1941	538	160,609	302,949	21,735	71,421	958	1,042
November	1,228	173,874	304,657	17,569	78,161	122	1,303
December	4,160	171,409	307,074	11,594	98,471	69	1,811
January, 1942	26,286	130,168	310,762	16,512	79,291		1,194
February	43,582	157,380	293,665	5,846	90,608		207
March	40,182	166,169	282,078	345	90,386		227
April	40,608	171,811	287,992	1,727	78,324	40	92
May	34,152	168,086	292,516	171	49,841	24	402
June	32,278	144,772	294,577	6,670	71,453		297
July	41,080	136,766	295,844		68,139		762
August	32,102	135,106	281,998		66,903	57	14,555
September	29,522	139,216	269,227		47,170	30	10,624
October	28,988	138,584	260,455		67,029		
November	27,030	134,909	252,327				
				82,170	957,197	1,300	32,516

[15]

[Verified.]

[Endorsed]: Filed Feb. 7, 1946.] [16]

[Title of District Court and Cause]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiffs' complaint admits, denies and alleges:

I.

In answer to Paragraph I thereof, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof, except that defendant denies that the question involved herein is one arising specifically under Section 3444 of the Internal Revenue Code.

IV.

In answer to Paragraph IV thereof, defendant states that he is without the knowledge or information sufficient to form a belief as [17.] to the truth of the allegations therein contained.

V.

In answer to Paragraph V thereof defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

VI.

Defendant denies the allegations contained in Paragraph VI thereof except that defendant admits that on or about

the 10th day of March, 1943, the Commissioner of Internal Revenue on the Miscellaneous List for January, 1943, page 6172-5, assessed the sum of $22,507.23 plus $5417.54, and $1,001.54 against the plaintiffs to cover tax, penalty and interest respectively.

VII.

Admits the allegations contained in Paragraph VII thereof.

VIII.

Denies the allegations contained in Paragraph VIII of the Complaint except defendant admits that on or about the 13th day of October, 1944, the plaintiffs herein filed their claim for refund in the sum of $20,673.38 covering a portion of the tax and interest paid on the above assessment with Harry C. Westover, the Collector of Internal Revenue for the Sixth Collection District of California, at his office in the City of Los Angeles, State of California.

IX.

Admits the allegations contained in Paragraph IX thereof.

X.

Denies the allegations contained in Paragraph X thereof.

XI.

Denies the allegations contained in Paragraph XI thereof.

XII.

In answer to Paragraph XII thereof, defendant states that he is without knowledge or information sufficient to form a belief as to [18] the truth of the allegations therein contained.

Wherefore defendant prays that plaintiff take nothing by the Complaint herein, that the same be dismissed and that the defendant be hence dismissed with his costs in this behalf expended.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT
Assistant U. S. Attorneys
EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By E. H. Mitchell
Attorneys for Defendant [19]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 9, 1946. [20]

[Title of District Court and Cause]

MEMORANDUM OPINION

This is an action wherein plaintiffs seek to recover certain excise taxes levied and collected by the Commissioner of Internal Revenue and involves the application of Sections 3406 (7), 3441-3442, 3440 and 3444 of the Internal Revenue Code, to the peculiar facts in the case at bar and presents primarily a question of fact as to whether the articles were rented or used by plaintiffs.

The plaintiffs operate a business of manufacturing decorative trimmings, made in part of rubber, for use principally in meat markets and are now generally used in place of parsley or some other natural green in decorating meat counters.

The plaintiffs' counsel in his able opening brief aptly states the questions involved as follows:

1. In determining plaintiffs' liability for excise tax under Section 3406 (a) (7), Internal Revenue Code, for the period from October 1, 1941, to October 31, 1942, did the Commissioner of Internal Revenue erroneously and illegally compute the tax on the basis that the plaintiffs "leased" a product manufactured by them, and that the tax, therefore, should me computed [26] upon the total gross revenue derived under such purported "lease"?
2. Did plaintiffs use a product manufactured by them in the operation of a business in which they were engaged, which would render them liable, to an excise tax on the fair market value of the articles so used?
3. Did plaintiffs include the excise tax in the price of the article with respect to which it was imposed, or did they collect the amount of the tax from any alleged vendee or vendees?

In areas where plaintiffs were not equipped to service the decorations, they sold their product outright but in districts where they maintained a service department, they did not sell their products but rented them to the trade. Such rentals were regularly services and soiled or damaged decorations were replaced with either new or renovated units.

Plaintiffs' contention in substance is that they were operating a decorative business and their products were used in the operation of said business and therefore come within the purview of Section 3444 of the Internal Revenue Code.

The evidence clearly establishes that the manufactured articles were rented and re-rented to the trade. While in a sense, they were rendering a service, at the same time the service consisted in the renting of the decorative units which they manufactured. This method was used in disposing of a portion of their output. Generally speaking any article that is rented requires a certain amount of servicing. The salesmen created a demand and instead of selling the decorative units rented them on a written rental agreement.

It naturally follows that the plaintiffs were not the users of the decorative units but were used by the trade to whom they were rented, therefore, these rentals were sals within the definition [27] thereof as provided in Section 3440 of the Internal Revenue Code.

I therefore am in accord with the findings of the Commissioner and direct that judgment be entered in favor of the defendant.

For the purpose of enabling defendant in preparing findings, I find that the Commissioner of Internal Revenue did not erroneously and illegally compute and collect the tax involved. I also find that the plaintiffs did not use the product manufactured by them. I further find that the plaintiffs did not include the excise tax in the articles rented by them.

Counsel for defendant is directed to submit proposed findings and judgment to me within ten days.

Dated: This 26 day of August, 1946.

BEN HARRISON

[Endorsed]: Filed Aug. 26, 1946. [28]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on July 9, 1946, before the above-entitled Court, sitting without aid or intervention of a jury; the plaintiffs appearing by Richard K. Yeamans, Esquire, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District, and Loren P. Oakes, Special Attorney for the Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of plaintiffs having been submitted to the Court for consideration and decision and the Court on August 26, 1946, having rendered its memorandum opinion herein, and the Court from the foregoing evidence, makes the following Findings of Fact and Conclusions of Law: [42]

FINDINGS OF FACT

1.

At all times material herein, the plaintiffs were, and now are, copartners doing business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law.

2.

The taxes sued for herein were paid to defendant in his official capacity as Collector of Internal Revenue for

the Sixth Collection District of California and at all times material herein, the defendant was such Collector of Internal Revenue.

3.

At all times material herein the plaintiffs have been engaged in the business of manufacturing, selling and leasing certain rubber articles, which were used for decorative purposes in numerous meat markets, delicatessens and similar establishments which were plaintiffs' customers.

4.

On March 10, 1943, the Commissioner of Internal Revenue assessed against the plaintiffs the amounts of $22,507.23, $5,417.54 and $1,001.54 representing respectively tax, penalty and interest for the period October 1, 1941 through October 31, 1942, with respect to the Federal excise taxes on rubber articles imposed by Section 3406 (a) (7) of the Internal Revenue Code.

The net dollar amount of sales made by plaintiffs in each of the months herein in question and the amount of tax due and payable thereon at the close of each of said months is as follows: [43]

1941	Net Amount of Sales	Tax Due
October	$ 687.85	$ 62.53
November	507.33	46.12
December	561.82	51.07
1942		
January	293.06	26.64
February	194.91	17.72
March	86.17	7.83
April	72.12	6.56

May	45.00	4.09
June	162.04	14.73
July	254.39	23.13
August	2,936.37	266.94
September	4,820.15	438.20
October	2,089.02	189.91
	$12,710.23	$1,155.47

The tax in this case, due, other than as a result of sales of their product made by plaintiffs, was computed on the following figures and in the following manner and was collected as above set forth:

1941	Revenue	Tax as Computed
October	$ 16,699.78	$ 1,518.16
November	21,317.63	1,937.97
December	19,529.84	1,775.44
1942		
January	18,663.13	1,696.65
February	17,929.09	1,629.92
March	20,731.87	1,884.72
April	17,410.03	1,582.73
May	20,124.39	1,829.49
June	20,116.23	1,828.75
July	19,168.67	1,742.61
		[44]
August	17,575.37	1,597.76
September	14,163.29	1,287.57
October	11,439.91	1,039.99
Totals	$234,869.23	$21,351.76

5.

On or about December 24, 1943, the Commissioner of Internal Revenue abated the penalty of $5,417.54 mentioned in paragraph 4 hereof.

6.

On January 26, 1944, plaintiffs paid to Harry C. Westover, the Collector of Internal Revenue for the Sixth Collection District of California, $22,507.23 and $2,248.37, to cover respectively the foregoing tax and interest accrued at the time of payment.

7.

On October 13, 1944, plaintiffs filed with defendant their claim for refund on official form 843 within the time and in the manner provided by law and a correct copy of such claim is attached to the Complaint herein filed.

8.

On or about April 16, 1945, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiffs' said claim for refund.

9.

The plaintiffs have not in any way contested the above assessment by the Commissioner of Internal Revenue insofar as it relates to taxes based upon total amounts received by plaintiffs from outright sales of their above rubber products to others, but plaintiffs by the Complaint herein and their above refund claim have contested only that part of the foregoing assessment relating to taxes assessed by the Commissioner of Internal Revenue by reason of leases made by plaintiffs to their customers with respect to the above rubber products which plaintiffs had manufactured. [45]

10.

Plaintiffs' operations here in question occurred during the 13 months period commencing October 1, 1941. Plaintiffs dispute the assessment of the above taxes with respect to certain of their revenues which constituted rentals received from their customers after the customers had entered into rental agreements with plaintiffs. All of these rental revenues were derived from plaintiffs' use of a certain rental agreement, a typical copy of which was mentioned and explained in paragraph VI of the "Stipulation of Certain Facts" filed herein on May 10, 1946. No other or further written or printed instrument was used by plaintiffs in depriving the foregoing revenues, which totalled $234,869.23 for the above thirteen months period.

11.

A typical copy of the above rental agreement was attached to the foregoing stipulation as Exhibit A thereto. Such rental agreement reads as follows:

"Rental Agreement
McCLINTOCK DISPLAY COMPANY, Lessor
The Original Rubber Leaf Decoration
3044 Riverside Drive Phone Morningside 12113
C20396 Los Angeles, Calif., October 1, 1941
Lessee X SUPER MARKET
2000 Connecticut Ave.,
Newark, New Jersey District
[X] New Contract [ ] Picked Up
[ ] Added to [ ] Contract Cancelled
Rubber Leaf
20 – 18" clips installed
20 – 18" R.L. @ 7¢ – $1.40
Total Feet 30 Total 18" Units 20 [46]

		Amount
20 Total Holders Installed	)	:
	)	:
Rubber Leaf Exchanged	)	:
	)	:
Collected for 3 Month	)	:
	)	:
Rent Payable in Advance	)	:
	)	Total Collected 4:20

Rent from 10-1-41 to 1-1-42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by ..... Lessee

Form R-A Western Salesbook Co., 3049 1. 12th St., L. A., An. 10338 9751."

12.

The outright sales by plaintiffs of their above rubber decorative products were made in areas where they were not equipped to render service in connection with the same. In other areas plaintiffs made leases of the foregoing products to their customers and in connection with such leases plaintiffs rendered certain services, including the replacement of soiled or damaged decorations with either new or renovated units. These replacements occurred from time to time during the terms of the leases agreed upon with such customers and said replacements did not cause any change with respect to the rentals payable or

the rental terms agreed upon in the various rental agreements.

13.

The plaintiffs were the lessors and were not the users of the above rubber products which were leased to their customers by rental agreements such as the one hereinbefore quoted. Such products were used by plaintiffs' customers who were the lessees thereof. In no instances did the plaintiffs use the foregoing products which they manufactured. [47]

14.

The plaintiffs did not include the above excise taxes on the articles rented by them in the rental charges therefor, nor did they collect the amount of tax from their customers regardless of whether the customers were vendees or lessees.

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1.

The rental agreement quoted in finding 11 constituted a lease and the revenues derived from the use of this agreement constituted rentals.

2.

The leases which plaintiffs made as to their products by use of the above rental agreement constituted taxable sales of such products within the definition of "taxable

sale" contained in Section 3440 of the Internal Revenue Code.

3.

The Commissioner of Internal Revenue correctly computed and assessed against the plaintiffs the foregoing Federal excise taxes and interest thereon with respect to the above sales and rentals of the rubber products. The collection of the foregoing taxes and interest was legal and correct.

4.

Plaintiffs have not overpaid their Federal excise taxes (or interest thereon) with respect to the sales and rentals of the foregoing rubber products.

5.

Plaintiffs have failed to prove a claim or facts upon which the relief prayed for in the Complaint or any other relief can be granted and they are not entitled to any refund whatsoever of Federal excise taxes (or interest thereon) with respect to the foregoing sales [48] and rentals of rubber products or any other matters involved in the above-entitled suit.

Dated this 16 day of October, 1946.

BEN HARRISON
District Judge

[Endorsed]: Filed Oct. 16, 1946. [49]

In the District Court of the United States
Southern District of California

Central Division

No. 5114-~~O'C~~ BH

L. H. and FLORENCE L. McCINTOCK, dba McCLINTOCK DISPLAY CO., a copartnership,

Plaintiffs,

v.

HARRY C. WESTOVER, Collector of Internal Revenue,

Defendant.

JUDGMENT

The above case came on regularly for trial on the 9th day of July, 1946, before the above-entitled Court, sitting without aid or intervention of jury; the plaintiffs appearing by Richard K. Yeamans, Esquire, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District, and Loren P. Oakes, Special Attorney for the Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the plaintiffs having been submitted to the Court for consideration and decision, and the Court, after being fully advised in the premises and after due deliberation, having rendered its memorandum opinion herein on August 26, 1946, and having filed its Findings of Fact and Conclusions of Law and order that Judgment be entered in [50] favor of the defendant in accordance with said Findings and Conclusions;

Now, Therefore, by virtue of the law and by reason of the Findings and other matters aforesaid, it is considered and ordered by the Court that the above-entitled action be dismissed and that defendant have judgment for and shall recover from plaintiffs the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of $10.00.

Judgment rendered this 16 day of October, 1946.

BEN HARRISON
District Judge

Approved as to form:

.....
Attorney for Plaintiffs

Judgment entered Oct. 16, 1946. Docketed Oct. 16, 1946. Book C. O. 40, page 243. Edmund L. Smith, Clerk: by Murray E. Wire, Deputy.

[Endorsed]: Lodged Oct. 8, 1946. Filed Oct. 16, 1946. [51]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the Court to vacate the Judgment entered in this cause on the 16th day of October, 1946, and for a new trial, for amended findings of fact and conclusions of law and for the entry of a new judgment herein in favor of said plaintiffs, on the following grounds, and each of them:

Insufficiency of the evidence to justify the decision, in that:

1. The so-called "rental agreement" set forth in Finding of Fact number 11 is not, according to the evidence, a "lease" but is, in fact, merely an accounting form printed by Western Salesbook Co. and used by plaintiffs for [52] accounting purposes, or, in the alternative, that it was used from time to time for accounting purposes and was not used exclusively and at all times as a "lease". This is illustrated by the remark of the Court (Tr. p. 55-56) as well as by the fact that, to hold that on each occasion of its use a new "lease" was entered into would be to hold that plaintiffs entered into some 25,000 to 30,000 "leases" per year (Tr. p. 59). Further, said "rental agreement" is not a lease in that it cannot be ascertained therefrom the term of said alleged lease nor the particular property which is the subject thereof.

2. Finding of Fact number 13 must be construed as meaning that plaintiffs' customers enjoyed the exclusive "use" of plaintiffs' products. In other words, because plaintiffs' products were "used" by plaintiffs' customers, ipso facto, such products could not be and were not, "used" by plaintiffs. This Finding cannot be reconciled with Finding of Fact number 3, wherein it is found that "* * * plaintiffs have been engaged in the business of manufacturing, selling and leasing certain rubber articles * * *." A reading of these two findings justifies only a conclusion that plaintiffs engaged in operating a business which they "leased" taxable articles manufactured by them, but that they did not "use" the articles so manufactured in that business.

3. Conclusion of Law number 1 fails to support the Judgment entered herein since it specifies only that the particular "rental agreement quoted in Finding 11 constituted a lease and the revenues derived from the use of this agreement constituted rentals," and makes no reference to any other or further "leases" executed by plaintiffs. It should be noted that that particular rental agreement provided only for a total rental of $4.20 during a three month period, which is obviously not the basis of a tax of $21,351.76.

4. Conclusions of Law number 2 and number 3 are in conflict in that if the leases made by plaintiffs of their products by the use of the rental [53] agreement referred to in Conclusion of Law number 1 constitute taxable sales of such products within the definition of "taxable sale" contained in Section 3440 of the Internal Revenue Code, then, the amount of tax due on such taxable sales should have been computed as provided in Section 3441 (b) Internal Revenue Code, and the Commissioner of Internal Revenue was in error in determining that Section 3441 (c) (1) Internal Revenue Code directed that the tax in connection with the rubber articles found to have been leased by plaintiffs was to be measured by the total gross rentals derived from all of such leases. That said Section 3441 (c) (1) Internal Revenue Code does not provide a measure of the tax but merely provides when the tax, as measured by Section 3441 (b), shall be paid.

5. That the evidence shows (Tr. p. 19; 31) that plaintiffs' representatives determined which decorations were to

be exchanged and, further, that in the event decorations were soiled at any time, the soiled ones would be removed and different decorations placed in the case (Tr. p. 29; 30). The Court, therefore, erred in concluding that the so-called "rental agreement" constituted a "lease" within the purview of Section 3441 (c) (1) and regulations 46, Section 316.9, since the facts referred to clearly show that the so-called "lessee" did not have either a continuous right to the possession or use of a particular article, without interruption, since any of plaintiffs' products would do, nor is the right to possession, irrespective of what articles are installed, continuous for any definite period of time.

6. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that plaintiffs used their product in the operation of a business in which they were engaged, and accordingly were subject to tax on the articles used by them as provided in Section 3444, Internal Revenue Code, and appropriate Regulations. [54]

7. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that by their acts and conduct plaintiffs did not enter into a lease or leases within the purview of Section 3440 or Section 3441 (c) (1), Internal Revenue Code and appropriate Regulations.

8. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that the manufacturer's sales tax due in this case should be based on the price at which the plaintiffs, as manufacturers, sold their prod-

uct, in the ordinary course of trade, to wit, .37945¢ each, and computed at ten per cent (10%) of said amount on the number of new units produced by plaintiffs during the period from October 1, 1941 to November 1, 1942, to wit, 82,170 of said units, irrespective of whether plaintiffs "used" or "leased" their product.

Plaintiffs do not file any affidavits herewith and base this motion on the pleadings and papers on file and on the minutes of the Court in this cause, and on this motion.

Dated, October 24, 1946.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Plaintiffs [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 24, 1946. [56]

[Minutes: Tuesday, December 24, 1946]

Present: The Honorable Ben Harrison, District Judge.

The motion of the plaintiffs for a new trial, filed Oct. 24, 1946, heretofore heard by the Court and ordered submitted, having been duly considered by the Court, it is now hereby ordered that the said motion for a new trial is denied. [67]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given That L. H. McClintock and Florence L. McClintock, copartners, doing business under the fictitious firm name and style of McClintock Display Company, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above entitled action on the 16th day of October, 1946.

Dated: February 14, 1947.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to James M. Carter, Atty. for Deft. Feb. 18, 1947. [68]

[Title of District Court and Cause]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE ON APPEAL

Good Cause Appearing Therefor, it is hereby ordered that the plaintiffs appellants may have to and including the 18th day of April, 1947 within which to file their record and docket the above-entitled cause on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 27 day of March, 1947.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Mar. 27, 1947. [69]

[Title of District Court and Cause]

ORDER PERMITTING ORIGINALS TO BE SENT TO CIRCUIT COURT IN LIEU OF COPIES

Good cause being shown therefor, it is hereby ordered that all of the original exhibits in the above entitled case, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and said exhibits may, by direction and stipulation of the parties, become part of the record on appeal in the above entitled case.

Dated this 8 day of April, 1947.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Apr. 8, 1947. [73]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 73 inclusive contain full, true and correct copies of Complaint for Refund of Excise Tax; Answer; Substitution of Attorneys; Copy of Notice of Transfer of Case; Minute Order Entered July 9, 1946; Memorandum Opinion; Proposed Findings of Fact and Conclusions of Law;

Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Defendant's Statement and Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for New Trial; Minute Order Entered November 4, 1946; Minute Order Entered December 24, 1946; Notice of Appeal; Order Extending Time to File Record and Docket Appeal; Stipulation Designating Record on Appeal and Order Permitting Originals to be Sent to Circuit Court in Lieu of Copies which, together with original plaintiffs' Exhibits Nos. 1 to 11, inclusive and copy of reporter's transcript of proceedings on July 9, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $19.15 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 15 day of April, A. D. 1947.

(Seal) EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, July 9, 1946

Appearances:

For the Plaintiffs: Messrs. Riley & Hall, by Richard K. Yeamans, Esq.

For the Defendant: Eugene Harpole, Esq., and Loren Oakes, Esq., Special Attorneys, Bureau of Internal Revenue.

Los Angeles, California, Tuesday, July 9, 1946. 10:00 A. M.

The Court: Are you ready to proceed, gentlemen?

Mr. Oakes: The defendant is ready.

Mr. Yeamans: The plaintiff is ready, your Honor.

The Court: As I understand, there is some testimony to be taken in this case.

Mr. Yeamans: Yes, we have two witnesses we would like to present on behalf of the plaintiff. We are prepared to present them. I wonder if the court would like a preliminary statement?

The Court: Perhaps a statement of what your witnesses would testify would enable the Government to stipulate they would so testify.

Mr. Yeamans: We would prefer to have the testimony of the witnesses.

The Court: Proceed then.

Mr. Yeamans: I will call Mr. McClintock.

EVERETT C. McCLINTOCK,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Everett C. McClintock. [3*]

Direct Examination

By Mr. Yeamans:

Q. What is your address, Mr. McClintock?

A. 485 East Highland Avenue, Sierra Madre.

Q. Are you related to the plaintiff, L. H. McClintock, in this case? A. Yes; a brother.

Q. When were you first employed by the McClintock Display Company? A. About 12 years ago.

Q. In what capacity? A. Salesman.

Mr. Oakes: At this point the Government would like to enter an objection to the introduction of testimony on behalf of the plaintiff inasmuch as the Government submits that Section 3443 (b) of the Internal Revenue Code, and Section 318.9 of the Treasury Regulations 46, provide that no over payment shall be credited or refunded in pursuance of a court decision or otherwise unless the person who paid the taxes is in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

1. That he has not included the tax in the price of the articles with respect to which it was imposed or collected the amount of tax from the vendee; or,

2. That he has repaid the amount of the tax to the [4] ultimate purchaser of the article, or unless he files with

*Page number appearing at top of page of original Reporter's Transcript.

(Testimony of Everett C. McClintock)

the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

What I have just read is a verbatim quotation from that section of the Internal Revenue Code.

Now, I wish to concede for the purpose of the record that both the refund claim and the complaint herein do make an assertion that there was no passing on of the tax; but it is the Government's contention that the mere assertion of that conclusion in the refund claim and the complaint do not satisfy the regulations which say that that shall be established in a sworn statement, and unless there is an establishing of that point in a sworn statement, namely, the refund claim, then under the statute and regulations there is no jurisdiction in the court to grant a refund herein. And I further submit that there is no statement of a cause of action in the filing of this complaint.

The Court: Why has the Government waited until this late time to raise that point?

Mr. Oakes: Well, it was mentioned in the pre-trial brief, the pertinent section of the Code and the pertinent section of the Regulations. I did suggest at one time to opposing counsel that they might start over with a refund claim which might be adequate. Possibly counsel thinks that his refund claim is adequate but for the purpose of the [5] record I do want the Government's position to be shown at the outset of the trial.

The Court: I will hear the evidence in the case and then you gentlemen may submit briefs.

I might say at this point I gather from an examination of the file it is the plaintiff's contention, primarily, that

(Testimony of Everett C. McClintock)

they were conducting a service organization and that their rubber decorations were simply a part of that business. Is that not true?

Mr. Yeamans: That is correct, your Honor.

The Court: I thought we would get the facts and then we will determine the law. I am not going to pass on your objection at this stage of the proceeding. If necessary we will continue the hearing to go into that question. As I say, I am going to hear the facts now and then counsel may submit their briefs.

Mr. Yeamans: I should say at this point, your Honor, that we are prepared to prove at this time that the amount of the tax, if any, was not included in our service charge and passed on.

The Court: I know, but he raises the question that you have not furnished the Commissioner with that evidence. In other words, his point is that you are simply asserting to that fact and that is insufficient; there should have been a sworn statement of some kind furnished to the Commissioner. [6]

Mr. Yeamans: I appreciate his point, your Honor. I was merely stating.

The Court: But the fact that you now intend to prove your claim, if the claim was insufficient your case would fall.

Mr. Yeamans: And if the claim is sufficient then the proof at this time is in order.

The Court: Yes.

Mr. Oakes: Your Honor, I am perfectly agreeable in the interest of expediting matters that the full testimony go in.

(Testimony of Everett C. McClintock)

The Court: But you want the record to show your objection?

Mr. Oakes: Yes.

The Court: The objection is overruled and we will proceed.

Mr. Oakes: And may I also have it understood, to avoid repetition, that that objection will continue throughout the hearing as he continues to bring out further evidence.

The Court: You have no objection to that, have you, counsel?

Mr. Yeamans: No.

The Court: It will be so understood.

Mr. Yeamans: Could we have the last question and answer read?

(Question and answer read.)

Q. By Mr. Yeamans: How long did you remain a salesman, Mr. McClintock? [7]

A. About two years.

Q. And what capacity did you assume at that time?

A. At that time, at the end of two years, I was made Pacific Coast sales manager.

Q. And how long did you remain Pacific Coast sales manager? A. About three years.

Q. And what other capacity did you assume then?

A. As general sales manager.

Q. And you have remained since then as general sales manager? A. Yes.

Q. And that would be about what year, please?

A. Since about 1938.

(Testimony of Everett C. McClintock)

Q. Mr. McClintock, approximately in what year was the partnership of L. H. and Florence McClintock formed?

The Court: There is no issue as to that, is there?

Mr. Yeamans: No, I believe not. I merely wanted to be sure we had the background.

The Court: Let us get down to the facts.

Mr. Yeamans: All right, sir.

Q. Mr. McClintock, will you state for us what steps your salesmen take in going into a market in connection with this service?

A. Yes. Our salesmen would enter a market and note the [8] presence or absence of decorations in the case and he would then state his business to the proprietor or operator of the market and explain in detail our service, which consists of furnishing the rubber leaf decorations for his cases. And going into further detail, he would explain that over the period the rubber leaf would receive frequent service and it would be reconditioned and cleaned, which would make his cases not only more sanitary but would make his merchandise more sales appealing; that it would be economical for him, save him time, and also that our service not only consisted of placing the decorations in the cases, but also that our men were trained in cutting and plattering and displaying the meat, which is very often a great help to the various operators.

Q. And it would be true, would it not, that in many parts of the East there are no fresh greens at certain times of the year?

A. Yes, in the extreme East or even Middle West I would say about eight months out of the year there is no fresh decoration available.

(Testimony of Everett C. McClintock)

Q. Let us assume at this point that the butcher to whom your man is talking—

Mr. Yeamans: And I say at this point, your Honor, we have arrived at a character called John X to be used as our customer. And the stipulation of certain facts will indicate what the first service would have been. So, for the purpose [9] of illustrating that, let us assume that the butcher has indicated his desire to avail himself of this service, what steps would the salesman take at that point?

A. Well, the first thing that he has to do is make a survey and a diagram of the case to determine the proper type and number of metal holders that would be required to properly set up the case with the decorations.

Q. And at this point I will ask you to examine this object and tell me whether or not that is one of the holders which is used in displaying the rubber leaf?

A. Yes; this is one type that is used in both markets and delicatessens.

Mr. Yeamans: We offer this in evidence as Plaintiff's exhibit first in order.

The Court: It will be admitted.

(The article referred to was marked as Plaintiff's Exhibit No. 1 and was received in evidence.)

Q. By Mr. Yeamans: I will ask you to examine this and tell me whether or not that is a type of metal holder used to display the rubber leaf? A. Yes, it is.

Mr. Yeamans: We offer this as Plaintiff's exhibit 2.

The Court: It will be received.

(The metal holder referred to was marked as Plaintiff's Exhibit No. 2, and was received into evidence.) [10]

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: After the salesman has prepared the diagram showing what type of holders are necessary, what steps does he then take?

A. Well, the first thing he has to do is to take the trays of meat out of the case and quite often has to clean the inside of the glass case so that the decoration will appear properly. Then he will place the holders in the case. As a rule, a great many of them will fit on the front of the meat racks or quite often he has to fix some special contrivance there to hold the holders in place along the front of the glass because the cases vary so greatly in angle.

Q. You mean the angle of the glass in the front of the case?

A. Yes; some will come up straight, and some will slant back quite sharply, so that it does take a trained man to know just what to do in those particular cases.

Q. Well, he will place the holders in the right angles, in the proper places, and then insert the decorations in those holders? A. Yes.

Q. Now, at this point I will ask you to examine this article and tell me what it is, please?

A. That is our rubber leaf decoration that is used for decorative purposes.

Q. And is that a new decoration or a used one? [11]

A. This is a new one here.

Mr. Yeamans: We offer this in evidence as Plaintiff's Exhibit 3.

The Court: It will be received.

(The article referred to was marked as Plaintiff's Exhibit No. 3, and was received in evidence.)

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: You have indicated that when he has his holders installed he then installs the decoration in each of the holders?

A. Yes, along the front of the case.

Q. What further steps does he take?

A. Then he replaces the platters, unless he can suggest to the operator or the proprietor that the merchandise can be greatly improved in the way of sales appeal by re-plattering or re-cutting and placed differently in the cases, which our men are trained to do. And quite often it will take our men, oh,—I have known as much as several hours to go over all the platters and re-platter the meat and make it more attractive looking in order to get the full value from the decoration and the display. Then he will place the trays back into the case and insert the rubber parsley between each platter, which makes the color contrast of green with the red, and makes it much more appealing to the customer.

Q. And I show you also what purports to be a picture of a display showing the manner in which the rubber leaf— [12]

The Court: Isn't there an exhibit in the stipulation that covers that?

Mr. Yeamans: It does not show this.

The Court: I know, but the court understands from reading the stipulation that these are decorations to set off the meat. It is an imitation of fresh greenery and it is placed in these markets, as the witness has stated, to aid in the sale of the butcher's product and that it is an inexpensive item; that it is a simple method for the butcher.

(Testimony of Everett C. McClintock)

Mr. Yeamans: That is correct, your Honor. I think your statement clarifies it sufficiently so that there is no need for further testimony in that regard.

Q. When the salesman has completed the display what steps does he then take—that is, the installation of it?

A. Well, the next thing he will do is make out the ticket showing the amount of rubber leaf installed and the number of holders installed and the price charged and the amount collected.

The Court: There is a sample of such ticket in the agreement.

Mr. Yeamans: We have several others we would like to bring out, your Honor, that is the purpose of this testimony, to illustrate the further use of that ticket.

It is at this point that I would like to offer the one which is attached as an exhibit, Exhibit A to the stipulation. [13]

The Court: Isn't there a stipulation to that effect?

Mr. Yeamans: That that ticket was used and that—

The Court: Just a moment. In connection with your rubber leaf business during the period from October 1st to October 31st, 1942, and that is the period that is covered here.

Mr. Yeamans: Yes, your Honor.

The Court: The plaintiffs used only the printed form of copy which is attached hereto and made a part hereof and marked Exhibit A. Exhibit A is your agreement with the X-Super Market as a sample.

Mr. Yeamans: Yes, that is correct, your Honor. And it is at this point that I propose to ask the witness whether or not this ticket would have been filled out in this fashion at the time of the completion of the initial display.

(Testimony of Everett C. McClintock)

Mr. Oakes: I do not believe there has been any showing of materiality with respect to that question or the entire line of interrogation.

The Court: As a matter of fact, this witness has been testifying to something that is in a sense thin air as to his method of doing business, which in sum and substance is a salesman's job.

Mr. Yeamans: We are interested in establishing, your Honor, and I think entitled to show that we used this product in the operation of a business in which we were engaged. [14]

The Court: I understand the purpose of it. What I am interested in is you are asking now about the different kinds of tickets when you have already stipulated that the Exhibit A here was the kind that was used during that period.

Mr. Yeamans: It says that particular form illustrates how it would have been filled in in the case of a new customer. Testimony will be offered at the trial which will illustrate other uses of this form under varying circumstances in connection with the conduct of the Plaintiff's business.

The Court: Of this form, you say?

Mr. Yeamans: Yes, your Honor.

The Court: All right, proceed.

Mr. Yeamans: And I merely at this point want to—

The Court: Proceed, counsel. I will tell you like I told an attorney the other day, it is easier to listen to the witness than to argument.

Mr. Yeamans: May I see the original file? Or may it be stipulated that the stipulation of certain facts is offered in evidence in its entirety?

(Testimony of Everett C. McClintock)

The Court: The stipulation of facts is binding upon both counsel—you each signed the stipulation.

Mr. Yeamans: That is correct, but I offer it in evidence in order that there is no question about it.

The Court: All right, it will be considered in evidence.

Mr. Oakes: No objection to the offer. [15]

(The document referred to was marked as Plaintiff's Exhibit No. 4, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 4]

In the District Court of the United States, Southern District of California, Central Division

L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs, v. Harry C. Westover, Collector of Internal Revenue, Defendant.

No. 5114 O'C-Civil

STIPULATION OF CERTAIN FACTS

It Is Hereby Stipulated and Agreed, by and between counsel for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, plaintiffs, and Harry C. Westover, Collector of Internal Revenue for the Sixth District of the State of California, defendant, that, for the purposes of the above entitled action, and all proceedings therein, the following facts shall be deemed to be true and correct:

I.

That at all times mentioned in the Complaint for Refund of Excise Tax, (hereinafter referred to as the Complaint) the plaintiffs were, and now are, copartners doing

(Plaintiffs' Exhibit No. 4)

business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law.

II.

That the copy of plaintiffs' claim for refund which is attached to the Complaint herein and marke*t* Exhibit "A" is a true and correct copy of the claim for refund filed by plaintiffs with defendant on the 13th day of October, 1944, and that said claim for refund was filed on official form 843, within the time and in the manner provided by law.

III.

That during the period from October 1, 1941 to October 31, 1942, plaintiffs sold 1279 new eighteen (18) inch units and 32,217 used eighteen (18) inch units of their product at an average selling price per unit as hereinafter shown, to meat and vegetable dealers, said sales being in the net sum of $12,710.23. That the sales were as follows:

	No. of Units	Average Selling Price Per Unit	Gross Receipts
New	1,279		
Used	32,217		
Total	33,496	.37945¢	$12,710.23

(Plaintiffs' Exhibit No. 4)

IV.

That the net dollar amount of sales, as set forth in Paragraph III hereof, was made by plaintiffs in each of the following months, as shown, and the amount of tax due and payable thereon as of the close of each month, is as shown:

1941	Net Amount of Sales	Tax Due
October	$ 687.85	$ 62.53
November	507.33	46.12
December	561.82	51.07
1942		
January	293.06	26.64
February	194.91	17.72
March	86.17	7.83
April	72.12	6.56
May	45.00	4.09
1942	Net Amount of Sales	Tax Due
June	$ 162.04	$ 14.73
July	254.39	23.13
August	2,936.37	266.94
September	4,820.15	438.20
October	2,089.02	189.91
	$12,710.23	$1,155.47

V.

That during the period from October 1, 1941 to October 31, 1942 plaintiffs' inventories (new and used units on hand, and used units on display), production of new units, units washed and brightened and new and used units sold to others, were as follows (all figures being eighteen (18) inch units).

(Plaintiffs' Exhibit No. 4)

	Inventory First of Each Month		Number of Units on Rental First of Each Month	Number of New Units Manufactured During Each Month	Number of Used Units Washed and Brightened Each Month	Number of Units Sold to Others Each Month		Un D car
	New Units	Used Units				New	Used	
41								
t.	538	160,609	302,949	21,736	71,421	937	1,063	10,8
ov	1,228	173,874	304,657	17,569	78,161	122	1,303	8,8
c	4,160	171,409	307,074	11,594	98,471	69	1,779	2,6
42								
n	26,286	130,168	310,762	16,512	79,291		936	2
b	43,582	157,380	293,665	5,846	90,608		465	1
ar.	40,182	169,969	282,078	345	90,386		227	1
or	40,608	171,811	287,992	1,727	78,324	40	71	3
ay	34,152	168,086	292,516	171	49,841	24	85	1,8
n	32,278	150,592	294,577	6,670	71,453		637	1,9
l	41,080	136,766	295,844		68,139		762	5,4
ig	32,102	135,106	281,998		66,903	57	7,721	3,5
p	29,522	139,216	269,227		47,170		11,400	1,4
t	28,988	138,584	260,455		67,029	30	5,768	3,6
ov	27,030	134,909	252,327					
				82,170	957,197	1,279	32,217	41,2

VI.

That in connection with their rubber leaf business during the period from October 1, 1941 to October 31, 1942, plaintiffs used only the printed form, a copy of which is attached hereto, made a part hereof, and marke*t* Exhibit A. That particular form illustrates how it would have been filled in in the case of a new customer. Testimony will be offered at the trial which will illustrate other uses

(Plaintiffs' Exhibit No. 4)

of this form under varying circumstances in connection with the conduct of plaintiffs' business. That no other or further written or printed instrument was used by plaintiffs in connection with their above business during the period from October 1, 1941 to October 31, 1942. The above form was used by plaintiffs in connection with deriving the revenues listed in VII hereof.

VII.

That the tax asserted to be due in this case, other than as a result of sales of their product made by plaintiffs, was computed by the Deputy Collector on the following figures and in the following manner.

1941	Gross Revenue	Tax Computed by Deputy Collector
October	$ 16,699.78	$ 1,518.16
November	21,317.63	1,937.97
December	19,529.84	1,775.44
1942		
January	18,663.13	1,696.65
February	17,929.09	1,629.92
March	20,731.87	1,884.72
April	17,410.03	1,582.73
May	20,124.39	1,829.49
June	20,116.23	1,828.75
July	19,168.67	1,742.61
August	17,575.37	1,597.76
September	14,163.29	1,287.57
October	11,439.91	1,039.99
Totals	$234,869.23	$21,351.76

(Plaintiffs' Exhibit No. 4)

That the term "Gross Revenue" as used in this paragraph means the gross revenue derived by plaintiffs from the operation of their business, after making allowance only for refunds either made in cash or allowed as a credit.

VIII.

That Section 3406 (a) (7) of the Internal Revenue Code became effective October 1, 1941. By reason of Section 611 of the Revenue Act of 1942, the taxes under Section 3406 (a) (7) of the Internal Revenue Code, do not apply to transactions after November 1, 1942.

IX.

That this stipulation is solely for the purposes of establishing the truth of the facts herein contained, and shall not be construed to be a waiver by either of the parties to it of their right to make objection at any time to the materiality or relevancy of said facts to any of the matters in issue.

RILEY AND HALL
By Richard K. Yeamans
Attorneys for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT
Asst. U. S. Attorneys
EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By Eugene Harpole
Attorneys for Defendant, Harry C. Westover, Collector of Internal Revenue.

(Plaintiffs' Exhibit No. 4)

"EXHIBIT A"

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

C20398 Los Angeles, Calif., October 1 1941

Lessee X SUPER MARKET

2000 Connecticut Ave.,

Newark, New Jersey District

[X] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Canceled

Rubber Leaf

20 – 18" clips installed

20 – 18" R.L. @ 7¢ – $1.40

Total Feet 30 Total 18" Units 20

20 Total Holders Installed Amount

Rubber Leaf Exchanged

Collected for 3 months

Rent Payable in Advance

Total Collected 4 20

Rent from 10-1-41 to 1-1-42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

(Plaintiffs' Exhibit No. 4)

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A., An. 1-0338 9751

[Endorsed]: Filed May 10, 1946. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy Clerk.

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 4. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: And I would like to ask the witness to state whether or not under the circumstances that we have been discussing in this particular case, does Exhibit A, attached to Plaintiff's Exhibit 4, represent the manner in which the contract for the X-Super Market would have been filled out as a new contract?

A. Yes; it shows right here.

Q. Would you please examine it and explain what the various entries mean?

A. There are places here for the salesmen—service men to mark. This is marked this way, which shows it is a new account and these others show—that is the reason these various spaces are here. I think Mr. Yeamans wants to bring out—

The Court: In other words, if it was a new contract it would be marked here with an X?

The Witness: Yes, sir.

The Court: And if there was something added to it that would be indicated there?

(Testimony of Everett C. McClintock)

The Witness: Yes, sir.

The Court: And if it was picked up—what do you mean by that? When they become soiled?

The Witness: No. If the merchant decided he didn't need [16] quite as much as he had and he wanted to discontinue part of his case, part of his display, which we have had happen a great many times, for some reason or other—maybe his business—

The Court: It reduced the number that he had on hand?

The Witness: Reduced the number of pieces that he had on hand, yes.

The Court: Then would you give him credit for it?

The Witness: We would give him credit for it, yes.

The Court: On what basis?

Mr. Yeamans: We have tickets illustrating that, your Honor.

The Court: I want to get the picture here.

The Witness: Well, that happens in various ways, your Honor. Quite often an operator will call a salesman in the various cities and state that he is discontinuing a portion of his case or it may come up this way. He may change his type of cases or he may change his type of display and as a rule the serviceman will visit the market and pick up any surplus.

The Court: Now, as I understand in this case you placed these decorations in stores on what you call a rental agreement, or whatever Exhibit A is designated?

The Witness: Yes, sir.

(Testimony of Everett C. McClintock)

Mr. Yeamans: It is so entitled, your Honor.

The Court: And would that rental agreement continue in [17] force until it was cancelled at so much a year?

The Witness: Well, as a rule in the East we base our service on a 90-day period and it is so explained to the operator, market operator at that time. The serviceman will state that he will return at periodic intervals of 90 days and, oh, pardon me, sixty days, and at that time—now, just as a good example, perhaps at the time the decoration has been installed the operator will take a little surplus, not knowing exactly just how much he is going to use, so on the next visit, the regular service call, the operator decides he does not need that surplus, so our serviceman will pick that up and issue a credit.

The Court: I want to get the picture of your method of doing business. For instance, you go in and you sell a man on your idea.

The Witness: That is right.

The Court: That is the object of your salesman going there. Then you have what you call a rental agreement. For what period of time does that rental agreement extend?

The Witness: That does not cover any certain time. An operator can call up this afternoon and—

The Court: Let us take this so-called Exhibit A. The charge there was for a period of three months, was it not?

The Witness: That is right.

The Court: So that states definitely the term of the agreement. Now, if in those three months some of these [18] decorations become soiled you replace them, is that not true?

(Testimony of Everett C. McClintock)

The Witness: Yes; here is something that happens quite often as an example.

The Court: Yon can answer that question. As I understand it, you keep their cases supplied with fresh decorations?

The Witness: That is right.

The Court: And if they become soiled or anything happens to them, you replace them with new material and take the old material back to your place of business and restore it?

The Witness: That is right; or replace them with new. Quite often we have to replace them with new rubber leaf.

The Court: So that is a continual process?

The Witness: Yes sir.

The Court: In other words, you rent these and render a service with them?

The Witness: Yes. I would like to explain, if you don't mind, how—what is connected with the service in some way if you don't mind. We are called in in so many different and various cases. Sometimes a serviceman will have to call back on a market as many as three or four times in a 60 or 90-day period to perform a service which is covered by the periodic service charge. The merchant absolutely does not have to pay extra at all.

The Court: That is part of the service that you furnish when you rent these decorations? [19]

The Witness: That is right. That is explained to the operator at the time.

The Court: And the salesmen work on straight commission or part salary and part commission?

(Testimony of Everett C. McClintock)

The Witness: At the time of this it was straight salary.

The Court: Where does that differ from any other salesman who sells an object that requires servicing?

The Witness: Well, the fact that our men have to be trained in knowing how to properly display our merchandise. Not only that but in the proper displaying of meats. Now, along about that time, why, the displaying of meats was not given a great deal of attention.

The Court: I am simply asking where it is different from an ordinary salesman's job. Many years ago I was a salesman for a typewriter company and I had to go into the shop and learn how to adjust typewriters and when I sold a person a machine I was working on a salary and even then I would have to go back and adjust it and render whatever service was necessary to the proper operation of that machine.

Now, I cannot see any difference in the service you are rendering and that which I rendered.

The Witness: Well, we have had occasion to compare our business to a linen laundry service, if that might be of any help in explaining it. A linen laundry supply company is not a rental organization. They are just a service organization. [20] They not only supply the linen, the gowns and aprons and so forth, but they keep them up, repair them and furnish new and they are just simply charged for the service that is rendered. They don't give you—furnish the gowns and receive a rental just for giving you the gowns and you take care of them. That is what has built our business, is the service connected with it, and not just the decorations alone. It has been proven

(Testimony of Everett C. McClintock)

to these, especially the large organizations, that it has been a real lifesaver to them because their men at the prices they are paid especially today, cannot devote their time to monkeying around with decorations and the fact that our men come in and service very frequently the decorations or change their displays around for them or are called out when they change meat cases and so many various things is what has built our business. It has been the service and not the fact we went out and rented so many pieces.

The Court: You may proceed.

Mr. Yeamans: Thank you, your Honor, for bringing that out.

Q. Calling your attention to Exhibit A, which is attached to Plaintiff's Exhibit 4, would you refer to that and tell me how many units of rubber leaf and how many clips were installed and what indication was made as to a service charge?

A. Well, in this particular case there was 20 18-inch pieces of rubber leaf decoration installed and 20 18-inch [21] metal holders.

Mr. Oakes: I move to strike any testimony that would in any way modify or vary the—

The Court: He is not attempting to modify anything. He is just explaining it.

Mr. Yeamans: I am merely asking him to explain what is there.

Mr. Oakes: As a matter of fact, I think he is even contradicting the document. The document says it is a rental agreement and it says that the title remains in McClintock Company, and yet this witness would en-

(Testimony of Everett C. McClintock)

deavor to contradict that rental terminology by saying that it is service rather than rental and to the extent there is a contradiction I do not think his testimony should be permitted.

Mr. Yeamans: I believe, your Honor, that we are entitled to show, and that is what we are endeavoring to do, exactly what this little ticket was used for. The authorities are clear that the mere fact that it is called one thing does not of necessity establish it as being of that character; and that we may go ahead and show how we used it and how it was treated by the parties concerned and that is what we are proposing to do.

Mr. Oakes: We have been hearing testimony as to how the business operates, but when he characterizes what the document calls for— [22]

The Court: That is what it calls for in so many figures.

Mr. Oakes: It speaks for itself.

The Court: Yes, it speaks for itself.

Mr. Oakes: He can give his evidence as to how they operate, but I think is it contradicting the document to say it calls for service charges rather than rent.

The Witness: Well, we have always—in fact, we have never really paid any attention to this ticket. It seemed to be just a form. It happened to start years ago and we just continued using it. It just happened to cover our particular business, but I think that any number of operators would testify that we do and always have called it a service, and that it is a service.

Mr. Oakes: I move that be stricken on the ground of hearsay.

(Testimony of Everett C. McClintock)

The Court: Well, it is a conclusion too, as far as that is concerned.

Mr. Yeamans: We are simply offering to show, your Honor, the manner in which this ticket has been used in the business as indicating the real purport and intent of the thing.

The Court: Counsel, is there anything you can add to the witness' testimony that will make it any clearer to the court? The witness has already told me he took these decorations and placed them in the various stores; they hired men [23] to not only sell the butcher shops on the idea, but that they kept men to service the decorations; that when they needed replacing they replaced them.

Mr. Yeamans: I think that the use of this ticket—may I say to your Honor that if I understand the Government's position it is that this form of sales ticket represents a lease and it is based on that that the Government is urging a tax in a very, very sizeable amount. Our position is that this instrument does not represent a lease; that it is merely an accounting slip, and I was simply going to prove the manner in which it was used in the business and the circumstances which gave rise to the—

The Court: Now, counsel, the conclusion of the witness as to what he considered it and all that is a bare conclusion. He has testified as to the manner in which they did business and how they used that slip. Now, what conclusions are to be drawn from that is for the court.

Mr. Yeamans: That is the function of the court, your Honor, but I would like to be able to show different uses of the slip.

(Testimony of Everett C. McClintock)

The Court: Strictly speaking, there has been hardly a word that this witness has testified to that is admissible in evidence, because he has told what the salesmen would do, which would be mere hearsay, and there has been nothing specific about it. I permitted it to go in so as to get the [24] picture, but I am not going to stand that abuse any more. I have tried to make it easy for you, and this witness, I think, has explained the way that they were doing business. He could talk here all day but what more could he tell me other than what he has already told me?

Mr. Yeamans: Except to identify the other tickets and give some further detail.

The Court: Then get to the other tickets.

Mr. Yeamans: Do I understand you will not admit the other tickets?

The Court: No, I have not said that. You have not offered them yet.

Mr. Yeamans: No, I haven't. I should also add, your Honor, that I may be proceeding on the wrong track. I had thought instead of bringing in specific tickets that counsel and I had understood, as indicated by our stipulation, that we would use this as a basis and proceed to make other illustrations thereby.

The Court: Counsel, if you will read your stipulation you will find you stipulated that was a ticket that was used during the period.

Mr. Yeamans: That is correct. And the only part of the stipulation to which I am referring, or the other part, is that testimony will be offered which will illustrate other uses of the form under varying conditions. [25]

(Testimony of Everett C. McClintock)

The Court: Other uses of the form, but you used that form?

Mr. Yeamans: That is correct, yes, but we used it in more than one circumstance.

The Court: Well, he has testified he used it in four different circumstances.

Mr. Yeamans: I think it, perhaps, was prepared for more than that, your Honor.

The Court: Well, just proceed, counsel.

Q. By Mr. Yeamans: Mr. McClintock, if it is assumed that the salesman, John X, who is referred to on the ticket, attached to the stipulation of facts, receives a call from the operator stating that he desires to extend the service to the delicatessen portion of the market, what steps would the salesman then take?

A. Well, he would visit the market as soon as possible and go through more or less the same procedure he did in decorating the meat case. He would have to make his diagrams and determine the holders, and then in a good many instances he would find that our regular stock holders would not be suitable for the equipment of that particular case. He would have to send the diagram in to the factory, which we make up—we make up the special metal holders and as a rule ship them back to him by express so he will have them as soon as possible for that particular job. [26]

Q. And when he completes the installation does he again make out a ticket? A. Yes.

Q. I will ask you to examine this ticket and tell me whether or not it is the type of ticket that the salesman

(Testimony of Everett C. McClintock)

would have made out on the completion of that particular job?

A. That is correct. This particular ticket shows he has added to the amount of rubber leaf already in that store.

Q. And it shows the quantities which have been added?

A. Yes.

Q. And the number of holders which have been added?

A. Yes.

Q. Does it show the amount of the additional service charge?

A. Yes, it does. It shows that he installed 32½ pieces there at seven cents.

Mr. Oakes: I move to strike that. We are again going into conclusions about service charges based on this document.

The Court: Where is there anything on this ticket that shows a service charge? Let me see the ticket. Where is there anything that sets forth any service charge?

The Witness: This shows here.

The Court: Added to.

The Witness: He has been called back to the market.

The Court: And he put in additional decorations? [27]

The Witness: He added this many units.

The Court: That many units?

The Witness: And collected for it.

The Court: Collected for it?

The Witness: Yes. He also gets the signature of the operator where it was installed and the serviceman signs it and the ticket acts as a receipt.

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: That is a receipt to the operator that the serviceman got this much money?

A. Yes, and that is sent into the office.

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

Mr. Oakes: Before that is submitted, I want an understanding as to whether the court is receiving this evidence with respect to service charges.

The Court: I am receiving it for what it shows on the face of it, counsel.

Mr. Oakes: But the characterization by the witness of it being service charges is a conclusion. That is what our lawsuit is about, whether we are renting here or something else.

The Court: And that is what the court is here for, to determine whether this is set up as a rental setup or whether it is a service organization. The fact that he says it is a service is a conclusion. That is something that I am going to [28] have to determine by the method of doing business. His constantly referring to it as a service charge does not of necessity make it a service, and the fact that this witness so refers to it does not make it so. That is a mere conclusion. I have looked upon his testimony in that respect.

Mr. Oakes: If it is considered as a conclusion, that is my point.

The Court: It is a conclusion. That is something I am going to have to determine. He testified he is running a service organization. That is his contention as I view it.

(Testimony of Everett C. McClintock)

Mr. Oakes: Well, that understanding is agreeable. I will object to that on its immateriality.

The Court: Objection overruled.

(The document referred to was marked as Plaintiff's Exhibit No. 5, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 5]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22330 Los Angeles, Calif., Oct 3 1941

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[X] Added To [ ] Contract Cancelled

Rubber Leaf

4 Pcs. 9″ R.L. – 2

15 " 15″ R.L. – 12½

18 " 18″ R.L. – 18

@ 7

Total Feet..... Total 18″ Units 32½

4 – A 3 Amount

15 – D 2 Total Holders Installed 2 27

Collected for 3 months

Rent Payable in Advance Total Collected 6 58

(Plaintiffs' Exhibit No. 5)

Rent from 10/3/41 to 1/1/42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A., An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 5. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: Mr. McClintock, what would be the effect of spilling ammonia on the rubber leaf decoration? A. It would turn it black.

Q. And if the ammonia had been spilled on the decoration and it had turned black and the market operator, Mr. John X, calls the salesman and informs him of that fact, what step would the salesman then take?

A. Well, he would visit the store and replace the soiled with fresh decoration.

Q. And he would do that at what time? [29]

A. At the earliest possible moment.

(Testimony of Everett C. McClintock)

The Court: And that would be at the expense of the butcher shop?

The Witness: No, no, that is done without any extra charge whatsoever.

Q. By Mr. Yeamans: In other words, I ask you to look at this document and tell me whether or not that is the type of ticket which would be filled out by the salesman as the result of such a transaction as we have just described.

A. Yes. This ticket must be filled out by the salesman or serviceman to show that he did visit the store and exchanged the decoration. He has the operator's signature. That has to come into our office in order to keep our records clear and the salesman's record clear.

Q. And exactly what does that ticket indicate? What is done?

A. Well, that ticket indicates that three pieces of rubber leaf decoration were exchanged and he indicates on the ticket that there was no charge made for that service.

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

The Court: It will be received.

(The document referred to was marked as Plaintiff's Exhibit No. 6, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 6]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22331 Los Angeles, Calif., Oct 13 1941

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

Total Feet..... Total 18" Units.....

Total Holders Installed

3 Rubber Leaf Exchanged No Charge

Collected for ..... months

Rent Payable in Advance Total Collected

Rent from..... to.....

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 6. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

(Testimony of Everett C. McClintock)

Mr. Oakes: The same objection. It is incompetent, [30] irrelevant and immaterial.

Q. By Mr. Yeamans: You have stated that a periodic return was made by the salesman to the store. What period of time was that at this particular time we are talking about? A. Every 60 days.

Q. And on his return at the end of the 60-day period what steps would the salesman take?

A. He would make a survey of the case and determine the amount of rubber leaf decoration that was soiled or he will ask the owner what he wishes changed and replaced with fresh, clean decoration.

Q. And having learned that would he make the replacement?

A. Yes, he would replace it and quite often he would have to take all the meat out of the case and quite often replace holders that are soiled from blood and grease and so forth, along with the decoration.

Q. During that period of time approximately what per cent of each display was in fact changed? At the periodic service period?

A. That varies a great deal. As a rule, about 50 per cent. Sometimes it is 100 per cent that the men have to change at each service call.

Q. Does the salesman on making that exchange complete a ticket? [31] A. Yes, he must do that.

Q. I show you an instrument and ask you to look at it and tell us whether or not that represents the ticket that would have been filled out at the time of the periodic service?

(Testimony of Everett C. McClintock)

A. Yes. This ticket shows that he exchanged three 9-inch pieces, nine 15-inch, and 21 18-inch, and also 19 holders, and that he designates here that there was no charge made for that call or service on this particular ticket.

Q. And for exchanges of that sort no particular charge is made? A. That is right.

Q. That is all included in your periodic service charge?

A. That is correct.

The Court: May I ask counsel if the items that are placed in here upon which there has been an exchange, is that included in the tax that has been levied?

Mr. Yeamans: Were you addressing me, your Honor?

The Court: Both of you.

Mr. Yeamans: Yes, your Honor, the tax has been computed by taking the gross revenue which has been derived from all of these charges and stating that under this instrument it was leased and that accordingly—

The Court: I understand that, but what I am getting at is this the basis upon which they are taxed? For instance, in a case there is no charge there would be no revenue and no [32] tax.

Mr. Yeamans: No, not on this slip.

The Court: That is all I wanted to know.

Mr. Oakes: Where there is no charge for the document and hence no tax to be paid upon a charge, I think that is an additional reason why this is immaterial. I also object to it on the ground that it purports to be hypothetical.

(Testimony of Everett C. McClintock)

The Court: It is hypothetical, but your stipulation is hypothetical, the original exhibit that you introduced.

Mr. Oakes: That is correct.

The Court: The stipulation is hypothetical.

Mr. Oakes: But I don't know because we agreed to one hypothetical case we are bound to continue on agreeing to hypothetical cases.

The Court: What do you want these people to do? Do you want them to go out and dig up witnesses and bring them in?

Mr. Oakes: If your Honor desires to continue it, but there wouldn't be any point in my delaying the trial.

The Court: I am trying to get the facts. The plaintiffs are claiming they are a service organization and they are introducing evidence here as to their method of doing business. Technically your objection is good. It is hypothetical and if you want me to do so I will have them bring in their records.

Mr. Oakes: No, I do not seek to delay the trial because [33] that would be inconvenient to all concerned. However, if there is no tax based on these—

The Court: The only thing I am trying to find out is whether they were. That is the reason I asked the question. In view of the fact that the objection as far as being hypothetical is concerned and the Government not insisting that they bring in the actual records the objection will be overruled.

(Testimony of Everett C. McClintock)

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

The Court: It will be received.

(The document referred to was marked and Plaintiff's Exhibit No. 7, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 7]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22332 Los Angeles, Calif., Dec 1 1941

Lessee X Super Market
2000 Connecticut Ave
Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

3 – 9″ R.L.
9 – 15″ R.L.
21 – 18″ R.L.

Total Feet..... Total 18″ Units.....

Amount

19 Total Holders Installed

30 Rubber Leaf Exchanged No Charge

Collected for ..... months

Rent Payable in Advance Total Collected

Rent from..... to.....

(Plaintiffs' Exhibit No. 7)

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH-Civ. McClintock vs. Westover. Plfs. Exhibit No. 7. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: Mr. McClintock, when the soiled decoration has been removed by the salesman from the market what disposition does the salesman make of that soiled decoration?

A. At the end of the day he will pack it in shipping cartons and ship it back to the factory for renovating.

Q. And when it is received in the factory what steps are taken?

A. Well, it is first unpacked. It is checked in there by a receiving clerk. He checks the number of pieces—

The Court: In substance he ascertains whether it can be renovated and that which cannot be is discarded and that [34] which can be renovated is renovated.

The Witness: Yes, sir.

The Court: Isn't that it?

(Testimony of Everett C. McClintock)

The Witness: At first he has to check the amount to see that is corresponds with the ticket.

The Court: That is immaterial.

The Witness: Yes. Well, it is sorted, your Honor. He sorts it out and determines which can be renovated and which cannot.

The Court: And that which can be renovated is placed back in stock for further use?

The Witness: Well, I don't know whether you are interested in hearing the process it goes through.

Mr. Yeaman's: May I say, your Honor, that we would like to show a little of the detail concerning this process.

The Court: You do not care to have him go into the detail as to who opens the boxes and how it is counted and those things.

Mr. Yeamans: I just meant the individual steps that it runs through at the plant.

The Court: All right.

Q. By Mr. Yeamans: Would you tell us the steps, as briefly as you can, that this is followed through the plant?

A. The first operation the metal, as you will see in this clip, has to be cleaned. It is run through buffing [35] machines to clean off the grease or blood and so forth. It is then placed in big machines for washing with special chemicals for cleaning the rubber. It is then placed individually on racks after it comes out of the machines and run into big drying rooms. And then as it comes out of the drying room it is sorted for the lengths and then it is run through a sterilizing and coating process to brighten

(Testimony of Everett C. McClintock)

it and then in the ovens for drying again and then it is repacked and shipped out.

The Court: How about the rubber? Do you renovate the rubber?

The Witness: Well, yes, that is the process I just explained to your Honor. That is how it is renovated.

The Court: Do you separate the rubber from the metal?

The Witness: No; the rubber is left in the metal clips but the machines and the washing machines will not remove the grease and grime and so forth from the metal clips, so that has to be done first through buffing machines to brighten it.

The Court: And the rubber is restored to its original color and appearance?

The Witness: Yes, sir.

The Court: And it is ready for the salesman again?

The Witness: Yes, it is packed and re-shipped.

Q. By Mr. Yeamans: And the freight on that soiled rubber leaf in and out of the plant is paid by the company? [36] A. Right.

Q. In your process you do use certain chemicals and other matters which are accounted for separately in the cleaning process? A. Correct.

Q. What steps are followed to replace the salesman's stock, briefly please?

A. Well, the salesman will determine what he is going to use in his next few weeks period of his work and will send in an order to the factory for that amount and it is shipped out.

The Court: In other words, you try to keep a salesman stocked with the necessary supplies?

(Testimony of Everett C. McClintock)

The Witness: Yes; the salesman plans to keep enough stock on hand for his regular work and also for new installations.

Q. By Mr. Yeamans: It will be noted from Plaintiff's Exhibit 4, that is Exhibit A attached to Exhibit 4, that the original period of time for which the charge was made was 90 days. Assume that the salesman from the McClintock Company returns to the X-Super Market what steps would he take at that time?

A. Well, he would return at his regular period—regular periodic service time or period and make the change or whatever was necessary or change the displays. And quite [37] often help the operator re-arrange his meat and show him new methods of displaying, which we do all the time.

The Court: You try to keep a satisfied customer?

The Witness: Well, we have found that by having our men trained in the modern method of displaying merchandise it has helped our business.

The Court: I say that is the idea, to keep a customer satisfied?

The Witness: Yes.

Q. By Mr. Yeamans: And if at that time he also collected a charge for a further period would he make out a ticket such as the one we have here?

A. That is correct.

Q. And what does that show?

A. That shows that he exchanged at this time 30 pieces of rubber leaf; he collected for two months period and again has the operator sign the ticket and he signs the ticket. It is a receipt that is given to the operator and the original is forwarded to our office for our record.

(Testimony of Everett C. McClintock)

Q. And what amount is shown that he collected?

A. Shows he collected for two months, monthly service of $3.67 or a total of $7.34.

Q. And there is no marking in any of the four squares at the top? A. No.

Mr. Oakes: The same objection, immaterial. [38]

The Court: The same ruling. It will be admitted.

(The document referred to was marked as Plaintiff's Exhibit No. 8, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 8]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22333 Los Angeles, Calif., Jan 2 1942

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

Total Feet..... Total 18" Units.....

Amount

Total Holders Installed

30 Rubber Leaf Exchanged

Collected for 2 months 367

Rent Payable in Advance Total Collected 7 34

(Plaintiffs' Exhibit No. 8)

Rent from 1/1/42 to 3/1/42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 8. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: If it be assumed that the manager of the market calls the salesman Smith to say that he has sold the delicatessen portion of the business and accordingly desires Smith to remove the decoration from the delicatessen counter, what steps would be taken at that time?

The Court: Counsel, I do not care to hear that. You have enough examples already.

Mr. Yeamans: I was going to illustrate the other thing which you asked. The only purpose that it has is to illustrate the meaning of that square.

The Court: You must assume that somebody can read and has ordinary intelligence. It is pretty well understood.

(Testimony of Everett C. McClintock)

Mr. Yeamans: There is no question about that except it illustrates he did not take the entire thing.

The Court: It would not make any difference if he took it all or not. He might have picked them all up or might have picked part of them up. What difference would it make?

Mr. Yeamans: It would make a difference in the way he filled out the slip.

The Court: What difference would it make how he filled out the slip? He testified as to how he was doing business in that respect. You testified about your plant, the differ- [39] ent steps that you take in processing this product and, as I understand it, you also manufacture these decorations, do you not?

The Witness: Yes, sir.

The Court: Out of rubber?

The Witness: Correct.

The Court: You are getting rubber now?

The Witness: Yes, we are getting rubber now.

The Court: Do you know from your own knowledge the investment that the plant has in machines that are used for renovating or the machines used in the original manufacture?

The Witness: No, I could not testify to that, your Honor. It is out of my department.

The Court: Well, do they use, for instance, machines to make these steel clips or do you make them?

The Witness: No, we make them right in the plant.

The Court: You have your own equipment for making them?

The Witness: Yes.

(Testimony of Everett C. McClintock)

The Court: And you paint them whatever color is on them in your own plant?

The Witness: Yes. That is all processed there.

The Court: And is the same machinery used when you renovate them or do you have special machines for it?

The Witness: No; that is different machinery for renovating than it is for making them. [40]

The Court: How many people do you employ, do you know?

The Witness: I could not tell you that to be correct on it. I had better not guess.

Q. By Mr. Yeamans: The steps which we have outlined here and the tickets which have been introduced are typical of those which occur constantly throughout the operation of your particular business?

A. That is correct.

Q. I hand you a card and ask you to look at it and tell me what it is?

A. This is one of our office record cards.

Q. And is that the original of the record?

A. Yes.

Q. That is not a hypothetical example?

A. No, sir; this is an original.

Q. And it is kept in the ordinary course of office accounting within your office? A. Correct.

Q. Will you please tell me what the card shows?

A. That shows that this particular account was opened on this date.

Q. What is the date? A. November 30, 1939.

Q. And does it show the amount—what date in 1939, please? [41] A. November 30th.

(Testimony of Everett C. McClintock)

Q. Does it show the amount of the service charge which was charged at that time?

A. Yes. The amount was 72 cents per month.

The Court: Counsel, this is before and is no part of the issue here. It does not come within the period we are concerned with.

Mr. Yeamans: We are now, your Honor, getting down to the proof of the fact that we did not add this service charge and the only case which I have found on the subject indicates the proper proof is a showing that the price in a particular case was the same before the date of the tax, during the date of the tax, and after the date of the tax. Accordingly we have produced for the purpose of satisfying that requirement our original records to establish what our price was before the tax, what our price was during the period of the tax, and what the price was subsequent to the period of the tax, to show that it was not added to the amount.

The Court: Does the Government dispute that?

Mr. Oakes: Well, we—

The Court: Or are you in the position of not knowing?

Mr. Oakes: We don't know whether they passed it or didn't pass it on.

The Court: I think instead of it going into the record there should be somebody who is in a position to [42] testify to the facts and then if you want to go into detail on your cross examination you may do so. I think that should be sufficient.

Mr. Oakes: I don't know how they will establish it. If it is a conclusion I would object to that.

(Testimony of Everett C. McClintock)

The Court: If a man has not raised his prices before and after, would that be a conclusion?

Mr. Oakes: Not the ultimate fact of whether the price changed or not. I don't think that would be a conclusion.

The Court: Well, you adopt your own method and when you have finished I will let you brief it. Generally we get some cooperation in these cases.

Q. By Mr. Yeamans: Are you familiar with the charges which were made by McClintock Company for its service from the period 1939 onward? A. Yes.

Q. What were those charges in the case of chain stores, approximately?

A. Approximately five cents per unit.

Q. When you say "per unit" you refer to a 19 or 18-inch length of rubber? A. Yes, sir.

The Court: Five cents for a month?

The Witness: Yes, five cents a month for an 18-inch unit. [43]

Q. By Mr. Yeamans: Did that charge change in 1940? A. No.

Q. Did it remain the same in 1941?

A. Yes, sir.

Q. And the same in 1942? A. Yes.

Q. And the same in 1943? A. Yes.

Q. What charge was made on the average to independent stores in 1939?

A. The average was about 7 cents per unit per month.

Q. That would be 7 cents per month each 18-inch unit of rubber leaf decoration. Did that charge change in 1940? A. No.

Q. Did it change in 1941? A. No, sir.

Q. Did it change in 1942? A. No, sir.

(Testimony of Everett C. McClintock)

Q. Did it change in 1943? A. No, sir.

Q. In other words, from the period 1939 to 1943 there was no increase in the prices charged by the McClintock Display Company for its services?

A. None whatever. [44]

The Court: Was there any amount added at any time on account of any tax?

The Witness: No.

Mr. Yeamans: I believe that is all from this witness, your Honor.

The Court: Cross examine.

Mr. Oakes: No cross examination.

The Court: That is all.

Mr. Yeamans: Mr. Triesch.

C. R. TRIESCH,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name please.

The Witness: C. R. Triesch.

Direct Examination

By Mr. Yeamans:

Q. What is your home address, Mr. Triesch?

A. 1120 North Jackson Street, Glendale.

Q. And your present occupation?

A. Manager of McClintock Display Company.

Q. When were you first employed by McClintock Display Company? A. In 1935.

(Testimony of C. R. Triesch)

Q. In what capacity, Mr. Triesch? [45]

A. Bookkeeper.

Q. What was the next capacity which you were employed by the company?

A. Approximately two years later I was employed as manager for the company.

Q. Have you been manager for the company ever since then? A. Yes.

Q. Mr. Triesch, it has been testified by Mr. McClintock that the tickets made out by the salesmen are sent to the home office. Would you tell the circumstances under which those tickets are sent?

Mr. Yeamans: May I say, your Honor, that we are at this point—we desire to show the use of that ticket in the office as well as the fact that we incur additional expense in this connection and it is for that purpose that these questions are asked.

The Court: I do not see the materiality of that, counsel

Mr. Yeamans: It is only to establish—what I propose to do, your Honor, is establish the amount of expense we incur in connection with our service.

The Court: Counsel, I do not think I will admit it. I am frank to say that I question seriously its admissibility. These are either on a rental basis or on a service basis.

Mr. Yeamans: That is right. [46]

The Court: And if it is a rental the expense in renting them is, I think, in the same category as a salesman's expense or the same category as advertising. That is your cost of selling, selling your service or selling your rental contracts.

(Testimony of C. R. Triesch)

Mr. Yeamans: What I wanted to show was the fact that by incurring this expense we incur an expense which is disproportionate to the initial cost of the item and so disproportionate that the factor of expense itself indicates that we cannot be simply renting an item.

The Court: Well, whether you are renting them or it is a service, it is apparent that this is not a charitable institution that you are running.

Mr. Yeamans: That is true.

The Court: And whichever way you run it, it is run for profit and apparently it has been profitable because it is almost amazing to see the extent that an idea such as this has grown.

Mr. Yeamans: I wanted to make that statement before I went ahead with this—

The Court: Go ahead.

Q. By Mr. Yeamans: In sending in the sales tickets, Mr. Triesch, what do the salesmen do?

A. Once each week each salesman is required to send in to the company what is known as Form 2.

Q. I show you an instrument and ask you whether or not [47] that is the Form 2 to which you refer?

A. This is it.

Q. What does the salesman show on that Form 2?

A. He shows the individual amounts collected from the customer or the market. He must total them and also on the face of this ticket he would show the expense incurred by him for the week.

Q. How much expense does he show in this case?

A. In this case he shows an expense of $5.15.

(Testimony of C. R. Triesch)

Q. Can you say from the ticket what that expense would be for?

A. No, we cannot. Ordinarily he would attach a voucher showing what the expense is for. If there is no voucher attached we would assume that it was for mileage or automobile expense.

Q. How would he establish his mileage or automobile expense?

A. The company pays a set sum of five cents per mile to the salesman for the use of his car.

Q. I notice there is an entry down here which shows debit and credit. Will you explain that, please?

A. Yes. That is accounting—our bookkeeping entry. After these Form 2's are checked with the tickets which would accompany this report to the office from which the record is made, at the top an accounting entry would have to be made [48] what we call a T account showing at the bottom on the debit side the actual amount of money received, the expense involved on the debit side and on the credit side the total service charges which were collected.

The Court: You say "service charges, total amount collected"?

The Witness: Yes.

The Court: From these slips that have been sent in?

The Witness: From these slips.

Mr. Yeamans: And the slips in this particular case would be Exhibit A attached to Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5.

The Court: On those forms?

Mr. Yeamans: On these two, yes.

The Witness: Yes.

(Testimony of C. R. Triesch)

Mr. Yeamans: We offer the form in evidence as Plaintiff's Exhibit next in order.

The Court: I do not see how it is material at all, counsel. I do not see where it tends to prove or disprove anything.

Mr. Yeamans: It brings us down to the question of our expenses, your Honor, and there are other expenses.

The Court: That does not make any difference. Even if he spent more than he took in, that would not make any difference. That does not tend to prove or disprove anything. [49] The cost of selling is there. There is no difference. We have the Supreme Court decision where they refused to allow the cost of advertising. I don't think the cost of selling and the cost of doing business is any different in that case, 323 U. S.

Mr. Oakes: F. W. Fitch?

The Court: Yes.

Mr. Yeamans: In other words, this could very well be a strictly selling expense. We do have some others.

The Court: But whether it is a service or selling, you have an expense. You compared this business to a laundry service. They hire men to go out and deliver the laundry and they collect the money, and they also have their automobile expense and at the end of the day or the end of the week they have to check up. There is constant expense. It does not make any difference whether you run a service or a rental proposition, you are going to have expense.

Mr. Yeamans: That is true.

The Court: And the expense would be just the same—it would not vary.

(Testimony of C. R. Triesch)

Mr. Yeamans: It would in connection with the renovation of these. If we did not renovate them then our expense would be vastly different.

The Court: You might rent an automobile and just because you did not furnish a new automobile every time but went to [50] the expense of repairing that automobile, that would not change the picture.

What I am trying to do is show you that what you are offering here, as far as I am concerned, does not tend to prove or disprove any of the issues in this case. There is one factual issue—is this a service organization?

Mr. Yeamans: Yes, your Honor.

The Court: Now, whether it is a service organization or a rental proposition you would have the same expense.

Mr. Yeamans: Yes, except insofar as our renovation is concerned.

The Court: Even if you rented the material you would have that renovating expense. The only reason you renovate the material now is because it is less expensive than to furnish new material.

Mr. Yeamans: Well, of course, if we furnished new rubber leaf we could not make any money.

Mr. Oakes: Well. I want my objection—

The Court: I am going to sustain the objection. It will be marked for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 9, for identification.)

Mr. Yeamans: Do I understand, then, your Honor,—it may be that I am proceeding incorrectly in part here—if your Honor should rule that the ticket is not and of itself a lease, [51] that if your Honor should still rule

(Testimony of C. R. Triesch)

that our arrangement is a renting one rather than a service arrangement, that your Honor would find that the tax was due then on the gross revenue denied?

The Court: There is no argument about that, is there? If there is any tax due the tax is due on your gross revenue, isn't it?

Mr. Yeamans: No, your Honor, that would not be true. If we use it in connection with the operation of a business the tax is on the fair value of the article used. We are not disputing that we owe a tax. We admit that we owe the tax. It is merely the manner in which the tax is to be computed. We contend that it is to be computed on the fair value of the article which we have because we use it in a business.

The Court: Well, as I understand, you have different columns here, the way you figure, but as I understand those are questions of law.

Mr. Yeamans: That is true.

The Court: Now, the one factual question in this case is whether you, strictly speaking, were renting these decorations or were furnishing a service and that these decorations simply represent your stock in trade for the carrying on of that service. Now, that is your contention, is it not?

Mr. Yeamans: Not quite, sir. Our contention is that within the purview of the law and the regulations that we use [52] these articles in the operation of a business in which we were engaged.

The Court: Where is your statement different from mine?

Mr. Yeamans: The only difference would be—

(Testimony of C. R. Triesch)

The Court: You worded it a little differently. You may proceed.

Q. By Mr. Yeamans: Mr. Triesch, when the ticket, when the form which is attached to Plaintiff's Exhibit 4 is received in the office of the McClintock Display Company, what entries are made on the records of the McClintock Display Company from that form?

A. First it would be turned over to a typist who would make up this yellow control card and on that she would type the date of installation, the ticket number, the name of the salesman and the name and address of the market. And also on the card she would indicate on the first line the date again of installation, the amount of the service charge for the month and the date to which it is paid. And under the column marked "Credit", the amount collected, and that is extended also into the balance column.

Q. And all of those figures are taken from that little ticket? A. Yes, sir.

Q. Does she make any other entries on the card from that little form of ticket? [53]

A. Yes. From the right—I assume that is dated October 1st, to the right of the black line she would again put down the date.

Mr. Oakes: I object. They are talking about what she puts down on a certain card. The card is the best evidence of that.

The Court: Yes, but the court needs an explanation of that which appears on the card.

Mr. Oakes: Well, I don't understand that they have the card here. I have not seen the card.

(Testimony of C. R. Triesch)

The Court: He is using a card now. He has it in his hand.

Mr. Oakes: I understood the witness to be testifying from this ticket.

The Court: This ticket is a hypothetical ticket.

Mr. Yeamans: From Exhibit A attached to Plaintiff's Exhibit 4, the employee would make the entries on the yellow form which Mr. Triesch now holds, is that correct, Mr. Triesch?

The Witness: That is right.

Q. By Mr. Yeamans: And she would have made the entries as you described?

A. On the first line, but also on the first line she would have to indicate the date and the amount of rubber leaf installed, which in this case is 20. Extend that over into the balance column. Also indicate the number of holders [54] installed.

The Court: What does all this prove, counsel? Simply that the company kept a record of each one of these transactions. It means he has a card covering a particular market and the service that they rendered to them and how much they collected for it.

Mr. Yeamans: And that the entries on this card would be made in each case from—

The Court: Certainly they keep a record. They are keeping a close record on their business. That is simply good business. Whether it was a rental business or a service business they would do the same thing.

Mr. Yeamans: That is true, your Honor, but I am attempting to overcome the Government's contention that this little printed form is a lease.

(Testimony of C. R. Triesch)

The Court: There is nothing on there that indicates it is anything to the contrary.

Mr. Yeamans: The manner in which it is used would indicate it is nothing more than an accounting slip because when it gets to the home office they simply make the entries from it to this accounting card, and it is filed away.

The Court: Counsel, it is quite apparent that the so-called rental agreement, at least one of the purposes of it, was so that the market owner would admit the ownership in the plaintiff here and that he could make no claim as to [55] owning the article. Now, that is one of the purposes of that agreement, having him sign it, so there would be no question of the ownership and title to these products.

Mr. Yeamans: That is true, your Honor, and I was simply proposing to show the other uses to which it was put.

The Court: I do not care whether you call it rental or call it service, they would still keep these records.

Mr. Yeamans: Will you stipulate that it is not a lease?

The Court: No, I don't think counsel would stipulate that. If he did there would be no lawsuit here.

Mr. Oakes: You mean that ticket there?

Mr. Yeamans: Yes.

Mr. Oakes: The ticket which is attached to the stipulation we, of course, contend that is a lease.

The Court: But that does not tend to prove or disprove anything. I am speaking of your method of accounting. Where does your method of accounting show anything?

(Testimony of C. R. Triesch)

Mr. Yeamans: It shows what this ticket is put to. It shows one of the uses at least.

The Court: Proceed. Let me ask this witness a question. This ticket comes to you and you keep a minute record of the information needed so you can keep track of that customer and what he has?

The Witness: Yes, sir.

The Court: And it is also to keep track of whether he [56] owes you anything?

The Witness: Yes, sir. Also, it is a record to show what the salesman has left at the market so his inventory—

The Court: For inventory purposes?

The Witness: Yes, sir.

Q. By Mr. Yeamans: In other words, you use it to accounting information off of it in detail? A. Yes.

Q. And the information which is contained on this card was taken from the various tickets? A. Yes.

Q. That have been introduced here, being in the form of Exhibit A attached to Plaintiff's Exhibit 4?

A. Yes.

Mr. Yeamans: We offer this in evidence as Plaintiff's exhibit next in order.

The Court: It will be admitted. It does not prove or disprove anything. Counsel, if this were a sale or a service or a rental agreement they would still have a record of it. That is simply good business.

(The document referred to was marked as Plaintiff's Exhibit No. 10, and was received in evidence.)

The Court: How long have you been with the company?

(Testimony of C. R. Triesch)

The Witness: Since 1935.

The Court: Have they always used this form? [57]

The Witness: That form was in existence—I believe that same form was in existence when I came with the company.

Q. By Mr. Yeamans: Where do you obtain the forms?

The Court: You have them printed, don't you?

The Witness: Some printing company or loose-leaf—I don't know the name of the company but some book concern.

The Court: It doesn't make any difference. It shows here who printed it.

Q. By Mr. Yeamans: During the period from October 1st, 1941 to October 31, 1942, how many times on the average in the course of a year was each 18-inch unit of rubber leaf renovated?

Mr. Oakes: Object to that as immaterial.

The Court: If he knows he may answer.

A. I do not know the number exactly. I could tell you approximately and the record would prove out that fact.

Q. By Mr. Yeamans: On the average could you say?

A. Close to the average, yes.

Q. What would that be?

A. Approximately four times.

Q. In other words, each 18-inch unit comes in four times a year for renovation? A. Yes, sir.

Q. About how many of these tickets which are in the form of Exhibit A attached to Plaintiff's Exhibit 4,

(Testimony of C. R. Triesch)

were [58] received during the period under consideration by the home office in the course of a year, if you know?

A. I would not know the exact amount. I know there is a great quantity. If I said 2,000 a month or 2,500 a month—there are quantities of them arriving.

The Court: That shows you took in plenty of money.

Q. By Mr. Yeamans: And there were a great number of tickets involved?

The Court: Certainly. That is assumed, because the amounts, apparently, do not run large.

Mr. Yeamans: No, your Honor.

The Court: It is an accumulation of small amounts.

Q. By Mr. Yeamans: Are you familiar with the prices which have been charged by the McClintock Display Company during the period you have been there?

A. Yes, sir.

Q. Are you familiar with the prices charged during the year 1939?

A. There were various prices according to the size of the markets.

Q. Well, in the case of chain stores, what was the average charge?

A. That price was very close, approximately five cents a unit per month.

Q. In 1939? [59] A. Yes, sir.

Q. Was there any change made in that charge in 1940? A. No.

Q. Was it increased in 1941? A. No, sir.

(Testimony of C. R. Triesch)

Q. Was it increased in 1942? A. No, sir.

Q. Was it increased in 1943? A. No, sir.

Q. In 1939 what charge was made for independent markets?

A. They were in varying amounts also and I think the average would be around 7 cents per unit.

Q. And was any increase in that price made in 1940?

A. No, sir.

Q. Was it increased in 1941? A. No, sir.

Q. Was it increased in 1942? A. No, sir.

Q. Was it increased in 1943? A. No, sir.

Q. During the period from 1939 to 1943 was there any amount added to the service charge which was collected by the McClintock Display Company by way of taxes?

Mr. Oakes: I object to that as calling for a conclusion.

The Court: If he knows. He is the general manager. [60]

Mr. Oakes: Well, it is characterized as to whether an amount was added by way of taxes.

The Court: The question is whether they passed on this tax that you are collecting to the customer. That is what you are claiming here. Of course, if he passed it on to the customer he would not have any standing.

Mr. Oakes: Well, it could be passed on in different ways and the ultimate issue, I think, is the effect of whether they re-couped by recovering additional amounts from their customers. Presumably the customers would

(Testimony of C. R. Triesch)

have to buy it from someone who would pay whatever taxes were legally due, and if there was competition they might be able to pay more, and I don't know what they mean when they said "as tax". It could be passed on without being labeled taxes, so it does not necessarily prove the point, to put it in the form of passing it on as taxes, if I understand the question correctly.

Mr. Yeamans: Well, it is one of those conclusions—

The Court: Just a moment. May I ask did you at any time alter your prices during the period in which this tax was claimed to have accumulated so as to include in your price the tax?

The Witness: You are speaking of the United States Federal Tax?

The Court: Yes.

The Witness: No, sir. [61]

The Court: That is the excise tax involved in this case.

The Witness: No, sir; we did not.

Mr. Yeamans: I believe that is all from this witness, your Honor.

Mr. Oakes: No cross examination.

The Court: That is all.

Mr. Yeamans: We would like at this point on behalf of the plaintiff, to offer in evidence for the purposes stated therein, the matter contained in the supplemental stipulation of facts which has previously been filed herein, reserving the right to prove the cost therein detailed as

offsets against the tax in the event that it should be ruled that the tax is due by virtue of a lease or rental agreement. And if counsel for the Government would prefer, I am prepared to offer them individually, item by item—

Mr. Oakes: If your Honor has read and particularly noted paragraph 4 of that supplemental stipulation—

The Court: Gentlemen, I am here to try this case. I want to get all the evidence in that I can and then I wanted it submitted on briefs.

Mr. Yeamans: It is for that purpose that I was offering this, your Honor.

Mr. Oakes: If I may continue—that paragraph 4 indicates that we went to considerable pains to state the conditions under which we would agree to factual data, which [62] we considered wholly immaterial. Now, those scheduled in the supplemental stipulation in our opinion do not have anything to do with the ultimate issue of whether this was a lease or whether it was a service arrangement, as opposing counsel apparently contends. But in the interest of allowing these facts to go in with a minimum of difficulty we did stipulate, provided the facts in the supplemental stipulation were addressed only to that issue.

Now, we object to them being used for any other issue. I think that counsel has just intimated, if I understand him correctly, that they might be interested in seeking deductions or exclusions with respect to the gross rentals or revenues derived from this business, and we object to the raising of such an issue.

The Court: Why not let the facts go in and then you gentlemen can argue it out in your briefs? I agree with your contention but when it comes to a tax matter I never make a definite commitment until I have had an opportunity to examine all the authorities and argument of counsel.

Of course it seems to me, whether this was a rental agreement or service, they were rendering, that these items set forth in paragraph 3 would be immaterial. But it may be that they have some materiality and I do not want to pass on it now.

Mr. Oakes: Well, I can appreciate your Honor's position, [63] but I do want to say that when neither their refund claim nor their pleadings raise any issue as to reducing the measure of the tax by exclusion or deductions and when they raise that point now they haven't got it pleaded.

The Court: The Supreme Court in the case I cited a little while ago probably determined any question in that respect.

Mr. Oakes: Well, I am afraid they are seeking deductions and they don't have the pleading to support a claim for deductions. I want the record to show that I am objecting to this evidence on an issue which is not raised by the pleadings or raised by the refund.

The Court: It will be admitted. I don't know why it has to be admitted in evidence, however. It is a supplemental stipulation of facts and it is binding on both parties.

Mr. Oakes: It is binding on us for the limited purposes stated.

The Court: The stipulation is binding. The contents of the stipulation are binding upon both parties. It is an agreement between the parties.

Mr. Yeamans: The stipulation reserved the right to object, your Honor. That is all. I simply wanted to be sure that Government counsel had his full opportunity to make such objection as he sees fit.

The Court: And he has objected. It may be received. [64]

(The document referred to was marked as Plaintiff's Exhibit No. 11, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 11]

In the District Court of the United States in and for the Southern District of California, Central Division

L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs, vs. Harry C. Westover, Collector of Internal Revenue, Defendant.

No. 5114-O'C-Civ.

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between counsel for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, plaintiffs, and Harry C. Westover, Collector of Internal Revenue for the Sixth District of the State of California, defendant, that, for the purpose of the above entitled action, and all proceedings therein, the following facts shall be deemed to be true and correct:

(Plaintiffs' Exhibit No. 11)

I.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs' costs relating to new eighteen (18) inch units manufactured during that period were as follows:

Green Rubber				
Produced during period:				
No. IX Thin Pale Latex Crepe—70 batches of 60 pounds each—4,200 pounds at 21.375¢ per pound			$ 897.75	
Processing—6,600 pounds at 13.5¢ per pound			891.03	
Chemicals—70 batches at $4.93 each			345.10	
Cost of 6,600 pounds of green rubber at 32.33¢ per pound			$ 2,133.88	
Add inventory at beginning—13,812 pounds at 32¢ per pound			4,419.84	
			$ 6,553.72	
Deduct inventory at end—none			—0—	
Green rubber used—20,412 pounds at 32.01¢ per pound				$ 6,553.72
Use tax on rubber used—3% of $897.75				26.93
Metal clips and holders:				
Material purchased			$ 348.57	
Add inventory at beginning			965.91	
			$ 1,314.48	
Deduct inventory at end			141.94	
Metal cost of clips used				1,172.54
Dipping:				
Chemicals purchased			$19,947.96	
Add inventory at beginning			569.77	
			$20,517.73	
Deduct inventory at end			7,904.95	
Material used			$12,612.78	
Forwarded				$ 7,753.19
Allocated to production of new units on the basis of production.				
New units	82,170	7.91%	$ 997.67	997.67
Service units	957,197	92.9	11,615.11	
Total	1,039,367	100.00%	$12,612.78	
Sewing materials				324.40
Direct labor				4,989.79
Manufacturing overhead				2,404.57
Cost of producing 82,170 new units (20.043 cents each)				$16,469.62

(Plaintiffs' Exhibit No. 11)

II.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs' costs relating to cleaning, brightening and repairing used units were as follows:

Materials:				
Laundry supplies purchased			$ 1,735.60	
Add inventory at beginning			207.37	
			$ 1,942.97	
Deduct inventory at end			1,155.69	
Supplies used				$ 787.28
Dipping:				
Chemicals purchased			$19,947.96	
Add inventory at beginning			569.77	
			$20,517.73	
Deduct inventory at end			7,904.95	
Materials used			$12,612.78	
Forwarded				$ 787.28
Allocation to production of new units on basis of units processed:				
New units produced	82,170	7.91%	$ 997.67	
Used units processed	957,197	92.09%	11,615.11	11,615.11
	1,039,367	100.00%	$12,612.78	
Direct Labor				11,591.71
Overhead Expense—Allocated				5,586.70
Cost of cleaning, etc., used units (Cost of processing each used unit 3.09035¢)				$29,580.80

III.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs incurred the following expenses in connection with the operation of their rubber leaf busi-

(Plaintiffs' Exhibit No. 11)

ness, no part of which has been deducted in computing "Gross Revenue" in Paragraph VII of the Stipulation of Certain Facts, heretofore filed herein.

	Amounts Withheld by Agents as Commissions	Salesmen's Salaries	Salesmen's Traveling Expense	Freight In and Out	Cleaning, Brightening & Repairing Rubber Leaf
1941					
October	$ 2,050.15	$ 3,538.61	$ 1,967.20	$ 1,215.80	$ 2,207.17
November	2,746.73	3,601.31	1,558.77	1,078.42	2,415.46
December	2,004.42	5,371.40	2,081.88	1,633.40	3,043.11
1942					
January	2,344.62	3,680.70	1,413.98	570.24	2,450.38
February	2,348.54	3,664.47	1,608.55	1,525.29	2,800.11
March	2,544.93	3,692.02	1,513.90	878.48	2,793.25
April	2,949.15	3,425.88	1,421.82	1,081.05	2,420.49

	Amounts Withheld by Agents as Commissions	Salesmen's Salaries	Salesmen's Traveling Expense	Freight In and Out	Cleaning, Brightening & Repairing Rubber Leaf
1942 (continued)					
May	$ 2,633.17	$ 3,226.85	$ 1,139.35	$ 857.40	$ 1,540.26
June	2,255.76	3,274.91	1,316.84	1,147.97	2,208.15
July	2,991.50	3,083.71	1,243.31	1,096.91	2,105.73
August	2,788.42	2,806.21	1,131.34	795.70	2,067.54
September	1,747.92	2,820.82	986.49	880.87	1,457.72
October	2,204.17	2,729.97	1,147.17	806.63	2,071.43
	$31,609.48	$44,916.86	$18,530.60	$13,568.16	$29,580.80

IV.

It is the understanding of all the parties, and it is hereby expressly agreed, in the event this Supplemental Stipulation of Facts, or any portion thereof, is offered and received in evidence, that the facts herein stipulated to be true may be considered by the Court as evidence for

(Plaintiffs' Exhibit No. 11)

the limited purpose only of supporting plaintiffs' contention that, during the period from October 1, 1941, to October 31, 1942, plaintiffs were engaged in the operation of a business in which they used their product, (such contention being denied by defendant and contrary to the determination of the Commissioner of Internal Revenue herein), it being expressly hereby understood that the defendant shall have the right at any time to make objection to the materiality or relevancy of any or all of said facts to any of the matters in issue, the purpose of this Supplemental Stipulation of Facts being solely to establish the truth of the facts herein contained and to limit consideration of them as hereinabove stated.

V.

It is the further understanding of all the parties, and it is hereby expressly agreed, that plaintiffs, by signing this Supplemental Stipulation of Facts, shall not be deemed to have waived the right to offer any other evidence they may desire to offer, for any purpose whatsoever, in the same manner as if this Supplemental Stipulation of Facts had not been signed, subject to the right of the defendant, at any time, to object to the introduction of any such evidence, on any grounds in the same manner as if this Supplemental Stipulation of Facts had not been signed, it being the intention and purpose of the parties to limit the use of this Supplemental Stipulation of Facts to the pur-

(Plaintiffs' Exhibit No. 11)

pose set forth in Paragraph IV hereof, but not in any other manner to limit the rights of the parties hereto.

Dated: May 31, 1946.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs

CHARLES H. CARR
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT
Asst. United States Attorneys
EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By Eugene Harpole
Attorneys for Defendant, Harry C. Westover, Collector of Internal Revenue

[Endorsed]: Filed May 31, 1946. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy Clerk.

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 11. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Mr. Yeamans: We expected one thing more, your Honor, but I believe it is not necessary and the plaintiff will rest.

Mr. Oakes: Defendant has no evidence.

The Court: Very well, gentlemen. I will allow you 15, 15, and 10 days, and the 15 days to start upon the receipt of the transcript.

Mr. Yeamans: Thank you, your Honor.

The Court: Will the court be furnished with a copy of the transcript?

Mr. Yeamans: If you desire it.

The Court: If you are going to refer to it in your brief you will have to furnish me with one or set it forth in your brief.

Mr. Yeamans: Will the reporter see that the court is furnished with a copy of the transcript, please?

The Court: Very well, the case will stand submitted, gentlemen.

(Whereupon, at 11:45 o'clock a.m., the proceedings in the above entitled matter were concluded.)

[Endorsed]: Filed Apr. 8, 1947. [65]

[Endorsed]: No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. L. H. McClintock and Florence L. McClintock, copartners, doing business under the fictitious name and style of McClintock Display Company, Appellants, vs. Harry C. Westover, Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 16, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11587

L. H. and FLORENCE L. McCLINTOCK, dba McCLINTOCK DISPLAY CO., a copartnership,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, the following is a statement of the points upon which appellants intend to rely on appeal:

I.

The Court erred when it construed the so-called "Rental Agreement" as a lease in legal contemplation.

II.

The Court erred when it construed the so-called "Rental Agreement" as a lease of the type which Congress contemplated when it inserted the word "lease" in Section 3440 of the Internal Revenue Code.

III.

The Court erred when it determined that appellants did not use their product in the operation of a business in which they were engaged within the meaning of Section 3444 of the Internal Revenue Code.

IV.

The Court erred when it failed to construe Section 3441 (b), Internal Revenue Code, as prescribing the measure of the tax in the case of a taxable sale, other than a taxable sale at wholesale, and it further erred when it failed to construe Section 3441 (c), Internal Revenue Code, as prescribing the time of payment of the tax in the limited instances therein referred to.

Dated April 4th, 1947.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Appellants

[Endorsed]: Filed Apr. 16, 1947. Paul P. O'Brien, Clerk.

No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

L. H. and FLORENCE L. MCCLINTOCK, dba MCCLINTOCK DISPLAY CO., a copartnership,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

BRIEF FOR THE APPELLANTS.

JOHN T. RILEY and
RICHARD K. YEAMANS,
770 Subway Terminal Building, Los Angeles 13.
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. H. and Florence L. McClintock, dba McClintock Display Co., a copartnership,

Appellants,

vs.

Harry C. Westover, Collector of Internal Revenue,

Appellee.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The opinion of the District Court [R. 20-22] is a memorandum opinion.

Jurisdiction.

This is an appeal from a judgment of the District Court entered October 16, 1946 [R. 32], in favor of the defendant, and denying the plaintiff's prayer for recovery of $20,673.38 [R. 6], paid and alleged to have been illegally assessed as manufacturers sales taxes. Motion for new trial was made [R. 32-36] and denied by order dated December 24, 1946 [R. 36]. Notice of appeal was filed February 18, 1947 [R. 37]. The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended.

Questions Presented.

First: Whether the District Court erred when it construed the so-called "Rental Agreement" [R. 57, 70, 73, 77, 82] as a lease in legal contemplation.

Second: Whether the District Court erred when it construed the so-called "Rental Agreement" [R. 57, 70, 73, 77, 82] as a lease of the type which Congress contemplated when it inserted the word "lease" in Section 3440 of the Internal Revenue Code.

Third: Whether the District Court erred when it failed to construe Section 3441(b), Internal Revenue Code, as prescribing the manner in which the tax should be computed in the case of taxable sales, other than taxable sales at wholesale, and whether the District Court further erred when it failed to construe Section 3441(c), Internal Revenue Code, as prescribing the time of payment of the tax, in the limited instances therein enumerated.

Fourth: Whether the District Court erred when it determined that appellants did not use their product in the operation of a business in which they were engaged within the meaning of Section 3444 of the Internal Revenue Code.

Statutes and Regulations Involved.

The applicable statutes and regulations will be found in the Appendix, *infra*.

Statement.

The case was tried by the Court sitting without a jury, and the evidence consisted of the testimony of two witnesses for the appellants, together with real and documentary evidence adduced by them. No evidence was introduced by the appellee. Appellants' testimony was, by stipulation [R. 54-55, 76], based on an assumed set of facts related to appellants' actual method of conducting their operations. After briefs were submitted, the Court rendered a memorandum opinion [R. 20-22], and subsequently filed findings of fact and conclusions of law favorable to the appellee [R. 23-30].

The following is a summary of the manner in which appellants conducted their rubber leaf decorative display service business:

Prior to the time appellants developed their decorative leaf service it was necessary and customary for meat markets to use parsley or some other natural green in decorating their meat counters. The use of these natural greens required the butcher or market operator to change them frequently because of natural deterioration. In addition, they were not washable, and if they became soiled or contaminated, it was either necessary to change the entire display or to allow the condition to remain, thereby producing an unsanitary situation. The time required of the butcher to make a change in his decorations was considerable and the expense of procuring fresh greens was often very substantial. Further, in many parts of the country at various times of the year, no fresh greens were available for decoration.

Appellants, after considerable experimentation, developed a decoration made of rubber, colored green, and cut to resemble parsley. They also developed a metal clip for

display use in holding the decoration. This decoration, and the clip, provided the color contrast and decorative effect which was desired in meat markets. However, appellants soon discovered that many butchers were not interested in purchasing this unique invention. It seemed that these butchers were unable themselves economically to install the necessary holders in the counters and when the decoration became soiled, they lacked facilites for renovation: but most important of all, many butchers preferred that a display expert solve their display problems and service their display needs. It was to meet this situation that appellants expanded their business to include not only manufacturing and sale of the decoration, but also a display service which appealed to the majority of meat markets.

Specifically, appellants' representative is a meat display expert [R. 62, 63]. He prepares an accurate diagram of the counter or showcase involved, [R. 46], determines the angle of the glass at the front of the counter [R. 47], and from this information and from the nature of the meat products sold ascertains what and how many decorations are needed [R. 46]. He removes the platters of meat from the display case [R. 47]. He washes and cleans the case [R. 47]. He installs holders and arranges the leaf in the holders [R. 47]. He then replaces and arranges the meat in an attractive manner on the platters [R. 48] and will even suggest re-cutting of the meat to obtain a more effective display [R. 48]. When the platters have been replaced in the case, he completes the decoration by inserting rubber leaf units between the various platters [R. 48].

Appellants' representative returned regularly (during the period under consideration every sixty (60) days) and

redecorated the showcases [R. 60, 74]. He then would remove the rubber decorations which he believed were soiled and would replace them with new or renovated decorations, as he might elect [R. 61, 74].

In addition, if the occasion arose, the appellants' representative would upon request return to the market and redecorate at intervals other than the periodic service time [R. 61]. For example, if ammonia is spilled on the rubber leaf the leaf will turn black [R. 71]. This might occur at any time and appellants are prepared to redecorate and to render this and other special services [R. 61].

It has been the experience of appellants that at the time the sixty (60) day periodic service is rendered, their representative usually determines to replace in excess of 50% of all the decorations as well as a considerable percentage of the holders [R. 74].

All of this service saves the time of the butcher who would otherwise be required to procure and change the greens if he continued to use the old-fashioned parsley method [R. 63].

Appellants make only a periodic service charge in connection with their display service business [R. 61]. No additional charge is made for the original installation of the holders, no additional charge is made for special replacement of soiled decorative units [R. 72]; no additional charge is made for periodic replacements [R. 75]; and the charge has no relation to the number of units which are actually replaced when the display is serviced. That is, the charge remains the same whether 10% or 100% of the decoration is replaced at any time. Determination of the

number of rubber leaf units to be replaced rests almost entirely with appellants' representative [R. 81].

Appellants incur substantial expense in renovating the soiled decorations [R. 107-108], and devote a considerable portion of their plant to the operation. For example, the cost of transporting soiled decorations back to the plant and of transporting renovated decorations from the plant to the salesman, during the period under consideration, amounted to $13,568.16 [R. 108]. It was also necessary during that period of time to expend $29,580.80 in costs within the plant in renovating the decorations [R. 108]. It will be noted that this cost is something slightly in excess of 3¢ per unit renovated [R. 107]. Since each unit must be renovated approximately 4 times a year [R. 99], and since the cost of manufacturing a unit is approximately 20¢ [R. 106], it is apparent that the expense of renovating the unit during each year amounts to approximately 60% of its initial cost. Also indicative of the expenses to which appellants are put in connection with the service phase of their business, is the fact that they were required to maintain special machinery for renovation [R. 85] and that the renovating process itself consisted of a substantial number of steps which required approximately one week to complete [R. 79-80].

These expenses were included in and were recouped only by means of appellants' periodic service charge. The amount of that charge bears no direct relation to the sales price of the article. The average selling price of appellants' products was approximately 38¢ per 18-inch unit

[R. 52] whereas the periodic charge based on a similar unit, in cases of independent stores, was 7¢ per month [R. 101], from which it is apparent that a sum equal to the sales price would be recovered in only six months, by means of the service charge. It follows that the service charge included a great many expenses which appellants would not have been required to bear had they only sold their product.

Examination of the so-called "Rental Agreement" [R. 57, 70, 73, 77, 82], will show that it is a service ticket printed on a standard form by Western Sales Book Company. In addition, the uses to which it was put further illustrate that it is designed only, and primarily used, for accounting purposes [R. 98], and shows that it was purely incidental that it contained an acknowledgment that the rubber leaf decoration remained the property of the appellants. Some of the uses to which that slip is put are as follows: It serves as a receipt by appellants' representative that he has collected and received money [R. 68]; it shows the quantity of the rubber leaf decoration and holders installed by the salesman from which the accounting records are set up in appellants' Home Office [R. 95, 97, 98]; it is an acknowledgment by the market operator that the rubber leaf and holders described have been installed in his counters [R. 68]; and it further serves as an acknowledgment by such operator that appellants' representative has rendered the service to which he is entitled. It is used to inform the accounting department when an account is opened [R. 57, 58], when additional rubber leaf or holders are "added to" those already in the hands

of a customer, [R. 58-59, 70] or when a portion of the amount in the hands of the customer is "picked up" [R. 59], when an account is cancelled, and how much has been collected [R. 91]. In addition, appellants received from 24,000 to 30,000 of these completed sales tickets in the course of a year [R. 100] and many of these sales tickets were used to inform the accounting department that only service had been rendered [R. 73, 77].

The butcher, in short, contracted for a decorative display service for his showcases [R. 62-63] and had no right to possession of any particular decoration for any particular period of time. Appellants' obligation was to decorate the butchers' counters and maintain them in an attractive state [R. 62]. They were under no obligation to furnish a decoration of any particular kind. It was rubber but it might as easily have been something else. Appellants determined when the display was to be changed and determined exactly which articles of decoration and which holders were to be changed and replaced [R. 74, 81]. In brief, appellants were engaged in the business of deocrating meat showcases, and as a part of that business, furnished rubber leaf decorations manufactured by them [R. 62-63].

Appellants concede that they manufactured a taxable rubber article within the scope of Section 3406(a)(7), Internal Revenue Code, as it existed during the period from October 1, 1941, to October 31, 1942. The dispute exists as to the manner in which the amount of the manufacturer's excise tax should be computed.

Summary of Argument.

The so-called "Rental Agreement" fails to identify any specific property as its subject, nor does it state any term, and, accordingly, it fails to meet the tests usually applied to determine whether an instrument is a lease.

Congress, when it used the language that "the lease of an article * * * shall be considered a taxable sale of such article" was contemplating only those leases which closely approximated sales, *i. e.,* leases wherein title passed to the lessee on completion of the payments called for, and the so-called "Rental Agreement" is very definitely not of that category.

At all events, Congress clearly has evidenced its intention that in the case of sales at wholesale the manufacturer's excise tax shall be computed on the price received; in the case of sales at retail the manufacturer's excise tax shall be computed on the fair wholesale market price of the articles (irrespective of the price for which in fact sold). It is further provided in all cases, that the whole of the tax shall be due and payable on the first of the month succeeding the month in which the taxable transaction occurred, except that in the cases of a lease, an installment sale, a conditional sale or a chattel mortgage arrangement—that is in the cases of the deferred payments specified—special provision is made to determine when the tax becomes due, *i. e.,* as the installments are actually collected, although, at the outset, the tax is computed in the same manner as in the case of other sales and it is merely to be paid over a period of time.

Appellants "used" the new rubber leaf decorations manufactured by them during the period from October 1, 1941 to October 31, 1942 "in the operation of a business in which they were engaged" and, accordingly, were subject to the excise tax computed on the fair wholesale market price of the decorations so used.

ARGUMENT.

I.

The District Court Erred When It Construed the So-called "Rental Agreement" as a Lease in Legal Contemplation.

The Supreme Court of the United States in *Herryford v. Davis,* 102 U. S. 235, 244, 26 L. Ed. 160, 162 (1880), when considering a case which involved determination of whether a document was a lease or a conditional sales contract laid down the following guiding principle:

> "* * * It is not to be found in any name which the parties may have given the instrument, and not alone in any particular provision which it contains, disconnected from all the others, but in the ruling intention of the parites, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. *The form of the instrument is of little account.*" (Italics supplied.)

Applying this rule to the so-called "Rental Agreement" [R. 57, 70, 73, 77, 82], printed in quantity by Western Salesbook Company, and recognizing that "the form of the instrument is of little account", it is apparent that this printed accounting slip did not constitute a lease form. It does not by any manner of means purport to contain the entire understanding of the parties. There is nothing in it which can be said to describe any property which is leased to the X Super Market for any particular period of time. In fact, appellants could install the decorative service, return five minutes later and exchange half of it, return still a few minutes later and replace each 18-inch unit with two 9-inch units and the butcher would have no ground for complaint so long as his meat counters were properly decorated. There is nothing in the form which

required appellants to furnish an article made from rubber. It might have been changed from rubber to any other substance and no provision of the so-called "Rental Agreement" would have been violated. While appellants, except when rendering special service, as a matter of election on their part, made their periodic service every 60 days, they could as easily have elected to remove and replace the decoration every week, or every two weeks or they could have rendered this service every 90 days, had they so desired. All these things and more could come to pass without in any way being subject to any language whatsoever appearing on the standard printed form referred to and, in fact, without violating any understanding between appellants and the butchers they served.

It was said in *Levin v. Saroff,* 54 Cal. App. 285, 201 Pac. 961, 963:

> "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment."

Accordingly, it is submitted that the sales slip designated "Rental Agreement" fails to measure up to the requirements of a lease in that it has no language from which the term thereof could be determined and, further, there is no specific property or even a specific type of property which is the subject of the lease. This conclusion is also borne out by the very volume in which these tickets were used, that is 24,000 to 30,000 per year [R. 100] which further negatives any idea that appellants entered into that many separate and distinct leases a year.

II.

The District Court Erred When It Construed the So-called "Rental Agreement" as a Lease of the Type Which Congress Contemplated When It Inserted the Word "Lease" in Section 3440 of the Internal Revenue Code.

The Congressional Committee Reports, both at the time the words "or leased" were inserted in the 1924 Revenue Act and at the time that language was inserted in the 1932 Act, as hereafter shown, as well as the general rules of statutory construction, compel the conclusion that Congress intended the tax to apply only to those leases which were in fact sales or which closely approximated sales.

Regulations 46, Section 316.9 [Appendix, *infra*], effective during the period under consideration, define a "lease" as:

> "* * * a continuous right to the possession or use of a particular article for a period of time. * * * The contract must give the lessee the right to possess or use the article, without interruption, for a period of time."

The record in this case is clear that appellants' representative determined which decorations and which holders would make the most attractive display. The butcher had no right to demand any particular decoration or to demand a new one instead of a renovated one, or even to demand one made of rubber. He had, in fact, no right to the possession of a "particular article," nor did he have a right to the possession of an article "without interruption, for a period of time." Appellants' representatives could and did remove soiled decorations from time to time and at various times. They might elect to change any part of the display. Ap-

pellants could at any time remove any particular decoration, their only obligation being to maintain an attractive display. It follows, at all events, that the Commissioner's Regulations themselves, by their very language, preclude a holding that appellants "leased" their product.

Research discloses that the assessment of a manufacturer's excise or sales tax on articles sold or leased first occurred in Section 900 of the Revenue Act of 1918. The words "or leased" were added at that time, but in neither the House, Senate nor Conference reports is reference made to the reason for including these words. Section 905 of the same act simply refers to "jewelry sold by a dealer." The latter section was amended by Section 604 of the Revenue Act of 1924, to provide that the tax was to be levied on "jewelry sold or leased." Concerning the addition of the words "or leased" inserted in Section 604, Senate Report 398, 68th Congress, 1st Session, found in 1939-1 C. B. (Part 2), page 294, contains the following very illuminating comment:

> "Since dealers frequently dispose of goods under a form of contract termed a 'lease', *which in reality is a contract for a sale with payment by installments,* it has been expressly provided that the tax herein levied applies to such transactions." (Italics supplied.)

It should also be noted that when considering the Revenue Act of 1921, the House proposed that in the case of the manufacturer who sold his product both at wholesale and at retail the excise tax should be computed upon the amounts actually received in either case. This proposal was rejected. Senate Report 275, 67th Congress, 1st Session, found in 1939-1 C. B. (Part 2) sheds considerable light on the attitude which Congress then entertained concerning the question of whether manufacturers should be

handicapped from a competitive point of view as between each other by the manner in which the excise tax was computed, and was followed by the Congress. That Report states, at page 201 of 1939-1 C. B. (Part 2):

> "MANUFACTURERS DOING A WHOLESALE AND RETAIL BUSINESS.
>
> "Under existing law a manufacturer of any of the articles taxable under Section 900 of the Revenue Act of 1918 doing a wholesale and retail business is permitted to compute the tax upon his retail sales upon the basis of his wholesale selling prices. The House bill eliminated this provision. The effect of the amendment proposed in the House bill would be to make each manufacturer compute the tax in the case of retail sales upon the amount received by the manufacturer from such sale, and would place manufacturers who have to engage in a retail business in order to place their articles upon the market at a great disadvantage when competing with manufacturers who are able to sell entirely at wholesale. Your committee recommends the retention of the present method of computing the tax in the case of retail sales."

The Revenue Act of 1926 made no material change in the language which is here under consideration and the Revenue Act of 1928 repealed all manufacturer's excise tax.

The Court in *Peoples Outfitting Co. v. U. S.*, 58 F. (2d) 847 (Ct. Cls. 1932) in considering the addition of the words "or leased" by the 1924 Revenue Act to the section relating to the excise tax on the sale of jewelry, said (page 851):

> "The same provision under which the tax is now imposed was contained in the 1918 and 1921 Revenue

> Acts. The 1924 Revenue Act made the tax apply also to cases where the same articles were leased, but *we think the intention of Congress in adding the words 'or leased' was to prevent any doubt or conflict where, under contracts of this nature, although fully completed, a claim was set up that the transaction was in fact merely a lease, and therefore not subject to the tax.*" (Italics supplied.)

The manufacturer's sales tax was restored in 1932. Congress then provided in Section 618 of the 1932 Act (later Section 3440, I. R. C., Appendix, *infra*) that "the lease of an article * * * shall be considered a taxable sale of such article." By this language Congress cannot be said to have spoked in either ordinary or precise legal language. That is, a sale is not a lease and a lease is not a sale in accepted legal terminology. Accordingly, it seems only reasonable to conclude that Congress was groping for language which would prevent entire avoidance of the tax and was not attempting by that language to state a different standard of computing the tax. The understanding of the members of Congress at that time is best illustrated by the following quotation from Senate Report 665, 72nd Congress, 1st Session, found in 1939-1 C. B. (Part 2) at page 528:

> "Sec. 616 of the House Bill, retained as Sec. 605 (actually 618) provides that the lease of an article shall be considered the sale of an article, so that the tax cannot be evaded by a lease contract which does not involve passage of title."

The understanding and intention of Congress to adopt an integrated excise tax measure is further illustrated by the fact that in Section 622 of the 1932 Act (later Sec. 3444, I. R. C., Appendix, *infra*) provision was made for

tax on the "use" by a manufacturer of his product, which tax was to be computed on the fair wholesale market value of the product so used.

When Congress, in Section 619 of the 1932 Act (later Sec. 3441, (c), I. R. C., Appendix, *infra*) used the word "lease" in a series of things enumerated, the others being "conditional sales" and "installment sales," it seems quite evident, under the familiar rule of *ejusdem generis,* that the word "lease" was used in the same sense as the context, and that although the transaction was called a lease what was actually intended was a lease which amounted to a sale. This interpretation is aptly illustrated in the *Peoples Outfitting* case, *supra,* and in the quotation from Senate Report 665, *supra.*

Further, construction of the statutes under consideration, should be approached in the light of the doctrine stated by the Supreme Court in the case of *Gould v. Gould,* 245 U. S. 151, 62 L. Ed. 211 (1917):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *Bankers Trust Co. v. Bowers,* 295 Fed. 89 (C. C. A. 2d 1923) the Court refused to construe a statute so as to require the income of a decedent and that of his estate to be placed on an annual basis, when another construction of the statutes was possible, saying:

> "Inequity would flow in following the formula proposed for taxation under Sec. 226(a), if applied to a decedent and his estate, particularly if the practice

> was indulged in of using the month and a fraction of a month in calculating the income. Where a construction of a statute will occasion great inconvenience or injustice, that view is to be vetoed if another and more reasonable interpretation is present in the statute."

The situation presented then is one in which the Court is called upon to construe a statute, or a series of related sections of a single Revenue Act, in such a way, within the language used, as will protect the revenue designed to be raised thereby and yet comply with the intention of Congress and the mandates contained in the two decisions last referred to.

If appellants had simply manufactured and sold their product to others for use in a display service business, the revenue to the Government would have been substantially the same as if appellants' contentions herein are adopted. That is, the revenue would have been 10% of the wholesale sales price in the first instance and 10% of the fair wholesale market price of the articles used by appellants, both of which are obviously equal.

To construe the statute otherwise would be to occasion "great injustice" to the taxpayers and in a manner which would closely parallel the situation considered in Senate Report 275, 67th Congress, 1st Session, *supra,* wherein a proposed change in the law was rejected on the ground that to effect the change:

> "* * * would place manufacturers who have to engage in retail business in order to place their articles upon the market at a great disadvantage when competing with manufacturers who are able to sell entirely at wholesale. * * *"

The injustice to appellants who used their product in the operation of a business as a means of producing revenue, as compared with a competitor who purchased appellants' product and thereafter engaged in the same business is easily illustrated. If it be assumed that appellants produced two units and sold one for 37.945¢ and used the other in their business, in competition with the purchaser of the first unit, the excise taxes on the two units, while imposed on the same articles by the same statute, would be computed in vastly different ways. That is, if it be further assumed that the unit retained and used by appellants produced a gross revenue of 60¢ in the first year it was used by them, the Government would demand a tax of 6¢, whereas in the case of the unit sold if it produced the same revenue, a tax of only 3.8¢ would be paid, the tax in the first case being computed on gross revenue and the tax in the second case on the fair wholesale sales price. The gross injustice produced by this method of computing the tax is even more clearly brought out if the second year of competition with the purchaser be considered. In that year it is assumed that each unit again produces 60¢ of revenue to the owner. In the case of the competitor no further tax is collected, but in the case of appellants the Government would demand another 6¢ tax. That is to say, identical units taxed under identical statutes would, in the case of the unit sold to the competitor produce a total revenue to the government of 3.8¢, whereas in the case of the unit used by the manufacturer a revenue of 12¢ would be produced in the first two years and

6¢ per year thereafter during its lifetime. Not only does such an interpretation produce a wide disparity in the application of the taxing act to identical items, but it places appellants "at a great disadvantage when competing" with persons who purchase their product, to paraphrase the language of Senate Report 275, 67th Congress, 1st Session, *supra*.

Applying the rules of the *Gould* and *Bankers Trust Co.* cases, *supra,* as well as common sense, the statute should be construed strongly against the Government and in favor of the taxpayer, and since the construction adopted by the Government would occasion great injustice and a more reasonable interpretation is present in the statute, it seems only logical and equitable to conclude that by using the language that "the lease of an article * * * shall constitute a taxable sale of the article" Congress must be held to have intended to prevent the evasion of the tax "by a lease contract which does not involve passage of title" (S. Rep. 665, *supra*) and not to have intended thereby to increase the revenue or to provide a wide disparity in the tax collected and cause great injustice as between taxpayers contingent only upon the label applied to the transaction.

The interpretation urged herein means that Congress intended the tax to be addressed to a lease which was similar to a sale and to base the tax on the sale price or fair market value of the taxable article and to prevent its entire evasion by a subterfuge. To interpret the statute in the manner here suggested by appellants would not

only protect the revenue designed to be raised thereby, by providing a uniform basis for computing the tax, but would also comply with the mandate of the *Gould* and *Bankers Trust Co.* cases, *supra.*

In addition, a contrary holding has the effect of determining that it was the intention of Congress in the case the transaction took the form of a lease, to impose a tax on revenue only—in substance an income tax—notwithstanding the tax was stated by Congress to be a manufacturer's excise tax. Since an independent income tax statute existed during the time in question, it seems wholly unlikely that by the statute under consideration Congress sought to impose a tax on revenue or income and was undoubtedly directing its taxing power to another sphere, to-wit: the manufacturer's wholesale sales price of an article. This would provide the basis for computing the tax, whether the article was sold at wholesale or retail, leased in such fashion as to constitute for all practical purposes a sale, or used by the manufacturer. This view is sustained by *Indian Motorcycle Company v. United States,* 283 U. S. 570, 75 L. Ed. 1277 (1931), wherein the Supreme Court was construing Section 600 of the Revenue Act of 1924. The Court says (p. 1280):

> "The section provides that there 'shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased.'
>
> * * * * * * * *

"Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is laid on the sale. Counsel for the government regard it is laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. *We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale.*" (Italics supplied.)

To summarize: Congress defined a taxable sale as including a disposition by a lease contract which closely resembled a sale, *i. e.* a so-called "lease" which provides that title shall pass on payment of the "rent" reserved. Such agreements are sometimes construed as true leases and at others as conditional sales (see 24 R. C. L., Sales, Sec. 747). In the interest of the uniform application of Federal tax laws, and, to avoid distinctions between jurisdictions, it was only reasonable to include this type of "lease" agreement when defining a taxable sale. Hence, Section 3440, Internal Revenue Code, is properly construed as meaning that the same excise tax will accrue whether the article is sold or whether it is "leased" by a "lease" which provides that title shall pass only when the "rent" reserved has been paid, and that this result shall follow whether the instrument be construed as a true lease or as a conditional sale. Since title would never pass under the so-called "Rental Agreement", it was not such a "lease" as would be within the purview of section 3440, Internal Revenue Code.

III.

The District Court Erred When It Failed to Construe Section 3441(b), Internal Revenue Code, as Prescribing the Manner in Which the Tax Should Be Computed, in the Case of Taxable Sales Other Than Taxable Sales at Wholesale, and It Further Erred When It Failed to Construe Section 3441(c), Internal Revenue Code, as Prescribing the Time of Payment of the Tax, in the Limited Instances Therein Enumerated.

Section 3406, Internal Revenue Code [Appendix, *infra*], states that an excise tax is thereby imposed "on the price for which (articles are) sold." (Parthensis added.) Section 3440, Internal Revenue Code [Appendix, *infra*], defines the lease of a taxable article, by the manufacturer, as a "taxable sale of such article." If, for the sake of argument only, it be conceded that appellants "leased" their product within the meaning of Section 3440, it would then follow that they had thereby consummated a "taxable sale" of such articles and had become liable, under Section 3406 for tax based "on the price for which sold." Congress, in Section 3441, Internal Revenue Code [Appendix, *infra*], has defined "Sales Price." Subsection (a) of Section 3441 relates to taxable articles sold at wholesale, and since it is not understood that the Government is contending that the appellants "leased" their product at wholesale, that subsection has no application to this Action. Accordingly, the subsection which would determine "the price for which (appellants) sold" (parenthesis added) their products would be subsection (b) of Section 3441, Internal Revenue Code. That subsection reads as follows:

"(b) If an article is—

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this chapter *shall* (if based upon the price for which the article is sold) be *computed* on the fair price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner." (Italics supplied.)

Section 3441(c), Internal Revenue Code, reads as follows:

"(c)(1) In the case of (A) a lease, (B) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, (C) a conditional sale, or (D) a chattel mortgage arrangement wherein it is provided that the sales price shall be paid in installments, *there shall be paid* upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment." (Italics supplies.)

The italicized portion of the respective sections show that one states the manner in which the tax "shall * * * be *computed*" and the other states the manner in which the tax "shall be *paid*" in the four cases therein enumerated. It is the purpose of this argument to demonstrate that Congress in the first instance used the word "computed" to mean exactly that, and in the second instance used the word "paid" to mean exactly that. The word "paid" was not employed to mean "computed."

No counterpart of Section 3441(c), Internal Revenue Code, is found in any revenue act prior to 1932. The

problem of when the tax was to be paid in case an article was disposed of on installment payments was dealt with in Regulations 48 (August 1924) which provided, with reference to a conditional sale and to a "lease", as follows:

> "Art 4. *When Tax Attaches:*
>
> * * * * * * * *
>
> "In the case of a conditional sale, where the title is reserved until payment of the purchase price in full, the tax attaches (a) upon such payment, or (b) when title passes if before completion of the payments, or (c) when, before completion of the payments, the dealer disposes of the sale by charging off by any method of accounting he may adopt the unpaid portion of the contract price, or (d) when the vendor discounts the notes of the purchaser for cash or otherwise, or (e) when the vendor transfers his title in the article sold to another.
>
> "In the case of a lease, *which includes a so-called conditional sale agreement purporting to be a lease,* the tax attaches upon the total amount payable under the instrument upon the execution thereof and delivery of the article to the so-called lessee or to a carrier therefor." (Italics supplied.)

It is obvious from the Regulation that the tax "attaches" under five different conditions in the case of a conditional sale, whereas in the case of a lease, it attached at the time of execution and delivery only. In other words, different times for the *payment* of the tax were prescribed in the cases of conditional sales and leases, by the prior Regulation.

Three cases illustrative of the difficulties under the prior law as defined by the last quoted Regulation—both as to the Government and as to the taxpayer—were considered by the Courts.

In the case of *Lippmans, Inc. v. Heiner,* 41 F. (2d) 556 (D. C. Pa. 1930), the Court held that the tax attached when the property was leased (without discussing the meaning of the word "leased"). In *Carter v. Slavick Jewelry Co.,* 26 F. (2d) 571 (C. C. A. 9th, 1928), conditional sales contracts aggregating some $72,000.00 were entered into, whereas only some $49,000.00 was collected thereon. It was held that the tax attached when the contract was entered into, and accordingly, on the higher figure. The Court said,

> "To conclude, it is our view that Congress intended no distinction between an absolute sale and a conditional sale, and that in either case the transaction is assessable when it is entered into."

The Ninth Circuit, in the *Carter* case, *supra,* held that the quoted portion of Regulations 48, so far as it related to postponing the time for payment of the tax, in the case of a conditional sale, was beyond the authority of the Commissioner, and that the tax accrued at the time of execution and delivery in both the case of a conditional sale and a lease. (One dissent.)

Peoples Outfitting Co. v. U. S., 58 F. (2d) 847 (Ct. Cls. 1932), was a case in which an instrument was designated a "lease" and provided for the payment of "rent to lessors" covering jewelry delivered to "lessee" and contained a provision that "lessors" agreed that if "lessee" fulfilled the agreement "lessors" would convey a free and clear title to the property covered. The Collector imposed an excise tax on the ground that the jewelry had been "leased" and that the tax was due when the instrument was signed. Plaintiff contended that the instrument was a conditional sales contract and that the tax was not due until the final payment had been made. It was undisputed

that the final payment was not made until after the repeal of the tax. The Court held that the instrument was in fact a conditional sales contract and, hence, no tax was due, under the provisions of Regulations 48. The Court expressly declined to hold the Regulations invalid as had been done in the *Carter* case, *supra,* although that case was not cited.

The last cited cases clearly point up the inconsistencies and the difficulties which beset both the administrators of the law and the taxpayers with reference to when the tax became due in the case of a so-called "lease" and in the case of a conditional sales contract. With the problems raised by these cases in hand, Congress enacted the precursor of Section 3440 in Section 618 and Section 3441(c) in Section 619(c) of the Revenue Act of 1932, which latter was the same as Section 3441(c) except for subsection (D), *supra.*

The General Counsel of the Bureau of Internal Revenue was early called upon to determine whether a lease fell within the provisions of the sections of the Revenue Act of 1932 last mentioned, and did so in General Counsel's memorandum 11,410, reported at length in Cumulative Bulletin XII-1 at pages 382-384. The General Counsel stated the facts, in part, as follows:

> "Under these contracts the rubber companies, as manufacturers, agree to furnish tires and tubes to operators of busses at a specified rate per mile. The manufacturer also agrees to service the tires and retains title thereto. * * * It is the opinion of this office that the tires and tubes covered by the contracts are leased within the intent of the Revenue Act and are taxable. The operator of the busses *agrees* upon termination of the contract, unless a new contract is entered into, *to purchase the tires* on the basis of the

manufacturer's price list, less the amount already paid under the mileage contract. In the case of damage by accident, abuse, or fire the cost of repair is to be borne by the bus company. In the case of destruction by accident, abuse, or fire the bus company is to be charged at the manufacturer's list price, less mileage paid.

"Section 602 of Title IV of the Revenue Act of 1932 imposes a tax on tires and inner tubes sold by the manufacturer, producer, or importer. Section 618 of the Act provides that:

" 'For the purposes of this title, the lease of an article shall be considered the sale of such article.'

"The questions on which an opinion is requested are as follows:

"Question 1. Should these contracts be considered sales contracts or leases?

Question 2. *How should the tax be computed?* * * *" (Itailcs supplied.)

Following these questions are two more, not relevant to this case, after which the General Counsel reviews the background and legal history of leases generally, and then continues:

"The bailments accomplished by the contracts in question are within the purpose of the statute. *The tax is primarily on sales. Leases were also made taxable because of their similarity to sales.* On page 41 of Senate Report No. 398, relative to the Revenue Act of 1924, it is said:

" 'Section 704(a): Since dealers frequently dispose of goods under a form of contract terms a 'lease', which in reality is a contract for a sale with payment by installments, it has been expressly provided that the tax herein levied applies to such transactions.'

"Section 618 of the Revenue Act of 1932 provides that for the purposes of Title IV the lease of an article shall be considered to be the sale of such article. On page 44 of Senate Report No. 665, relating to that measure it is stated that the foregoing section was retained in the law so that the tax could not be evaded by a lease contract which does not involve passage of title.

"The transactions in the instant case may also be viewed as contracts for the sale of tires with payment by installments measured by the mileage covered. By the contracts in question the parties get practically the same results that sales would produce. The bus company gets the use of the equipment and the manufacturer receives a money compensation approximating, it may be assumed, the sale price of the equipment.

"* * * * * * * *"

(Italics supplied.)

After thus so pointedly demonstrating that leases are taxable only if sufficiently similar to sales, the memorandum concludes:

"It is the opinion of this office that tires and tubes covered by the contracts are leased within the intent of the Revenue Act and are taxable. This answers the first question. The answers to the second and fourth questions are indicated by S. T. 496 (C. B. XI-2, 455). It is stated therein:

" 'The tax on tires and tubes supplied under a mileage contract *is incurred* at the time when such tires and tubes are delivered by the tire manufacturer to his customer and *should be computed on the full weight of such articles.*'

"* * * * * * * *"

(Italics supplied.)

There can be no question from the foregoing that the General Counsel of the Bureau of Internal Revenue, writing at the very time of its enactment, entertained serious doubt that leases of *every* type were intended to be included in Sections 618 and 619(c)(1) of the 1932 Act (from which Sections 3440 and 3441(c)(1) are derived), since he has confined his opinion to "leases" which were made taxable "because of their similarity to sales."

Of much more important in assistanting the Court to decide this case, is the fact that the General Counsel, whatever else may be said, did *not* decide that Section 619(c)(1), now Section 3441(c)(1) I. R. C., required a tax which is based upon or measured by the total rental payments received by plaintiffs. He reviewed and confirmed a previous decision by his own office that the measure of the tax was that prescribed by Section 602, of the Revenue Act of 1932. Since he was confronted with and actually decided that the forerunner of Section 3441(c)(1) I. R. C. should be applied in determining whether a taxable transaction had occurred (*i. e.* a "leasing" similar to a "sale") and then determined that a *different section* prescribed *the measure* of the tax, there can be no escape from the conclusion that the General Counsel's ruling was that Section 3441(c)(1) does not prescribe a measure of the tax and the tax in the instant case must be *computed* as prescribed by some other section.

From what has been said it is apparent that, if appellants "leased" their product, and thereby entered into a transaction which constituted a "taxable sale" (I. R. C. 3440) they did so at either wholesale or retail and, in either case, became subject to the manufacturers sales tax based on the fair wholesale price of the articles so sold or leased. The amount of the tax remains the same what-

ever is done, but, if the articles were "leased", then the tax is payable as prescribed by Section 3441(c), Internal Revenue Code, whereas if appellants "used" the article the whole of the tax became due on the first of the month succeeding the month in which the "use" occurred.

The arguments herein presented not merely harmonize the manner in which the tax is to be *computed*—and to agree that the *form* of the transaction determines the quantum of the tax, reflects on the understanding of Congress—but, the revenue is protected by making the tax become due as payments are in fact collected and the inadequacies of prior law are thereby obviated.

If the article is sold at wholesale the tax is computed on the price for which sold. Internal Revenue Code, Section 3441(a). If the article is sold at retail the tax is computed on the fair wholesale price. Internal Revenue Code, Section 3441(b). If an article is used by the manufacturer thereof the tax is computed on the fair wholesale price. Internal Revenue Code, Section 3444. In all cases the tax is due and payable on the first of the month succeeding the month in which the taxable transaction occurred, Internal Revenue Code, Section 3448 [Appendix, *infra*], the only exceptions to this rule being a lease, an installment sale, a conditional sale and a chattel mortgage arrangement, in which four cases only, the tax is computed as directed by one of the previous Sections, but the taxpayer is afforded the privilege, under Section 3441(c), of paying the tax as the sales price is collected.

To illustrate: A manufacturer's fair wholesale price on a certain taxable article is $1,000.00; his retail price $1,500.00. If the tax rate is 5% and he sells at wholesale for cash, the tax is $50.00. Likewise, if he sells at retail, there is no change in the tax rate, and the tax is still

$50.00. If, on the other hand, the manufacturer uses the article in a business in which he is engaged, the tax is computed on the $1,000.00 wholesale price and remains $50.00. In each case the tax is due, in full, on the first of the next month. If, however, the manufacturer sells this article using a conditional sales contract (which is classified the same as a "lease" under Section 3441(c)), and, whether such sale is at wholesale or retail, the tax would be due and payable as follows:

		Amount of Tax Due
Wholesale price	$1,000.00	
Down payment	100.00	$ 5.00
Balance	$ 900.00	
Add interest, carrying charges, etc.	100.00	
Total installment payments due	$1,000.00	
First month	100.00	4.50
	$ 900.00	
Second month	100.00	4.50
	$ 800.00	
Third through tenth month	800.00	36.00
Total tax due and payable		$50.00
Total money collected	$1,100.00	

		Amount of Tax Due
Retail price	$1,500.00	
Down payment	100.00	$ 3.33
Balance	$1,400.00	
Add interest, carrying charges, etc.	150.00	
Total installment payments due	$1,550.00	
First month	100.00	3.11
	$1,450.00	
Second month	100.00	3.11
	$1,350.00	
Third through fifteenth month	1,350.00	40.45
Total tax due and payable		$50.00
Total money collected	$1,650.00	

The monthly installments of tax due in the case of the sale at retail have been computed by determining what portion of the payment is proportionate to the total to be paid on account of the fair wholesale price (*i. e.* $1,000.00 minus 10/15th of the down payment or $66.67 = $933.33 ÷ by the number of payments (15) = $62.22 per month X the rate of tax (5%) = $3.11 tax due per month).

The illustration points up the fact that in all cases of the disposition of the same article—whether by wholesale, retail, use, lease, installment sale, conditional sale or chattel mortgage—a taxable transaction results and that in each case the amount of the tax is exactly the same, the only difference being that Section 3441(c), Internal Reve-

nue Code, permits, as it says, the tax to be paid, in the cases therein enumerated, as the installments are in fact collected. In no case, however, is the tax to be computed on the money collected or gross revenue as was done in appellants' case.

IV.

The District Court Erred When It Determined That Appellants Did Not Use Their Product in the Operation of a Business in Which They Were Engaged Within the Meaning of Section 3444 of the Internal Revenue Code.

Appellants concede that they manufacture a taxable article and that they "used" various numbers of that article —to be exact 81,429 of them—within the meaning of Section 3444 of the Internal Revenue Code [R. 54], and that they are accordingly liable to an excise tax based upon the fair wholesale market value of the articles so used, but not upon gross revenue from their whole display service business.

A striking analogy occurs between Section 3444 of the Internal Revenue Code [Appendix, *infra*] and Section 23(k) of the Revenue Act of 1932. The latter section concerns deductions from income and provides, in part, that such deductions shall include:

> "* * * a reasonable allowance for the wear and tear of property *used in the trade or business,* including a reasonable allowance for obsolescence. * * *" (Italics supplied.)

Similar language contained in Section 23(k) of the 1928 Revenue Act was considered by the Court in *Kittredge v. Commissioner,* 88 F. (2d) 632 (C. C. A. 2nd,

1937). The facts in that case were that plaintiff acquired a winery in 1919, that it was operated only slightly until 1922, and that from 1922 to 1931 the winery stood idle, and in the latter year was abandoned by plaintiff who claimed the entire cost as a loss. The Court held that the phrase quoted from Section 23(k) should be read as equivalent to "*devoted* to the trade or business" (italics supplied), and hence that depreciation was allowable during the period when the winery remained idle. Accordingly Kittredge was required to deduct the depreciation from his basis in determining the amount of his loss, because during the period 1922 to 1931 the idle winery was considered by the Court as "devoted to trade or business" and hence "used in trade or business."

A similar case is *Yellow Cab Co. etc. v. Commissioner*, 24 F. Supp. 993, wherein the cab company purchased taxicabs in 1931 and placed them in storage from July, 1931, to November 30, 1935, because of poor business conditions, at which latter date the taxicabs were abandoned. The Court held that the corporation had intended to use the taxicabs during the time they were stored if business had improved and, accordingly, that the taxicabs were being "used in the trade or business" during the period they were in storage and that a deduction for depreciation was allowable during that time. The basis of the corporation was therefore reduced by the amount of the depreciation allowable and the amount of the loss accordingly reduced.

In construcing Section 23(l) of the Revenue Act of 1938, the Board of Tax Appeals (now The Tax Court of the United States) said in *John D. Frackler v. Commissioner*, 45 B. T. A. 708 at page 714:

> "The rule deducible from the above decisions is that, *where the owner of depreciable property devotes*

> *it to rental purposes and exclusively to the production of taxable income, the property is used by him in a trade or business* and depreciation is allowable thereon." (Italics supplied.)

The decision was affirmed in 133 F. (2d) 509 (C. C. A. 7th, 1943).

The Court below found [R. 24] that "* * * plaintiffs have been engaged in the business of manufacturing, selling and leasing certain rubber articles * * *." The record discloses that appellants operated a display service business, the main purpose of which was to supply meat markets and butchershops with a decorative service. Appellants' representatives were trained meat display experts [R. 62, 63] who not only relieved the butcher of the chore of changing fresh greens but also gave practical instruction in the display and cutting of meats [R. 48]. Appellants conducted a business, in connection with which, and as a part of which, they used a taxable article manufactured by them. To paraphrase the language of the *Frackler* case, *supra:* Appellants, as owners of rubber leaf decorations, devoted those decorations to rental purposes and exclusively to the production of taxable income, and the rubber leaf decorations were used by them in a trade or business. It is true that depreciation is not an issue in this case, but there is squarely presented the issue of whether appellants "used" their rubber leaf decorations within the meaning of Section 3444, Internal Revenue Code. The definition contained in the *Frackler* case, *supra*, states the meaning of the word "use" as employed by Congress in one section of the Internal Revenue Code and no reason is apparent why a different definition should apply to the same word merely because employed in a different section of the same code. The conclusion is in-

escapable that appellants "used their product in the operation of a business in which they were engaged" and, accordingly, as prescribed by Section 3444, Internal Revenue Code, the tax "shall be *computed*" upon the fair wholesale price of the articles so used, and the whole amount of such tax was due and payable on the first day of the month succeeding the month in which the use occurred.

Conclusion.

It is submitted that the manufacturer's excise tax due from appellants was erroneously computed based upon the gross revenue derived from the operation of appellants' display service business and that the judgment below, which affirmed that method of computation, was in error and should be reversed.

Respectfully submitted,

JOHN T. RILEY and
RICHARD K. YEAMANS,
Attorneys for Appellants.

APPENDIX.

Statutes and Regulations Involved.

Section 3406, Internal Revenue Code: "EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941:

"(a) Imposition.—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

* * * * * * * *

"(7) Rubber articles.—Articles of which rubber is the component material of chief weight, 10 per centum. The tax imposed under this paragraph shall not be applicable to footwear, articles designed especially for hospital or surgical use, or articles taxable under any other provision of this Chapter."

Section 3440, Internal Revenue Code: "DEFINITION of SALE. (As amended by Section 553, 1941 Act):

"For the purpose of this Chapter the lease of an article (including any renewal or any extension of a lease or any subsequent lease of such article) by the manufacturer, producer or importer shall be considered a taxable sale of such article."

Section 3441, Internal Revenue Code: "SALE PRICE:

"(a) In determining, for the purposes of this chapter the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax

imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

"(b) If an article is . . .

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price; the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

"(c) (1) In the case of (A) a lease, (B) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, (C) a conditional sale, or (D) a chattel mortgage arrangement wherein it is provided that the sales price shall be paid in installments, there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of he total amount to be paid represented by such payment. * * *"

Section 3444, Internal Revenue Code: "USE BY MANUFACTURER, PRODUCER, OR IMPORTER (as amended by Sec. 553, 1941 Act):

"(a) If—

"(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio taxable under section 3404) and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of section 3442, relating to tax-free sales); or

"(2) any person manufactures, produces, or imports a tire, inner tube, or automobile radio taxable under section 3404, and sells it on or in connection with, or with the sale of, an article taxable under section 3403 (a) or (b), relating to the tax on automobiles, or uses it; he shall be liable for tax under this chapter in the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner."

Section 3448, Internal Revenue Code: "RETURN AND PAYMENT OF MANUFACTURERS' TAXES.

"(a) Every person liable for any tax imposed by this chapter other than taxes on importation shall make monthly returns under oath in duplicate and pay the taxes imposed by this chapter to the collector for the district in which is located his principal place of business or, if he has no principal place of business

in the United States, then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. * * *"

Section 316.5, Treasury Regulations 46 (1940): "WHEN TAX ATTACHES:

* * * * * * * *

"In the case of a lease, an installment sale, a conditional sale, or a chattel mortgage arrangement, a proportionate part of the tax attaches to each payment. (See section 316.9.) In case of use by the manufacturer the tax attaches at the time the use begins."

Section 316.7, Treasury Regulations 46 (1940): "TAX ON USE BY MANUFACTURER, PRODUCER, OR IMPORTER:

"If a person manufactures, produces, or imports an article covered by these regulations, except a tire or inner tube, and uses it for any purpose (other than as material in the manufacture or production of, or as a component part of, another article manufactured or produced by him which will be taxable or sold free of tax under the provisions of section 316.21 or 316.22, he shall be liable for tax with respect to the use of such article in the same manner as if it were sold by him.

"If a person manufactures, produces, or imports tires and/or inner tubes, and sells them on or in connection with, or with the sale of, automobiles, taxable tractors, or motorcycles, or if he uses them for any purpose whatever, he shall be liable for tax in such cases as if such tires and inner tubes were sold by him as separate articles. The tax will be computed at the rates prescribed by section 3400. (See sections 316.30 to 316.32, inclusive, and section 316.54.)

"The use by any person, in the operation of a business in which he is engaged, of any taxable article which has been manufactured, produced, or imported by him or his agent, makes such person liable to tax on such use. Except in the case of tires and inner tubes the tax will be computed on the basis of the fair market price of the article. (See section 316.15.) However, the tax on the use of such taxable article will not attach in cases where an individual incidentally manufactures, produces, or imports for his personal use or causes to be manufactured, produced, or imported for his personal use any taxable article."

Section 316.9, Treasury Regulations 46 (1940): "Basis of Tax on Leases, Installment Sales, Conditional Sales and Sales Under Chattel Mortgage Arrangements:

"Special provision is made in the law for computing taxes due in the case of leases of articles and installment and so-called conditional sales. The term 'lease' means a continuous right to the possession or use of a particular article for a period of time. It does not

include the use of an article merely as occasion demands, but the contract must give the lessee the right to possess or use the article, without interruption, for a period of time.

"Where articles are leased by the manufacturer, or sold under an installment-payment contract with title reserved, or under a conditional-sale contract with payments to be made in installments, a proportionate part of the total tax shall be paid upon each payment made with respect to the article. The tax must be returned and paid to the collector during the month following that in which such payment is made.

* * * * * * * *"

Section 316.15, Treasury Regulations 46: "FAIR MARKET PRICE IN CASE OF RETAIL SALES, CONSIGNMENTS, ETC., GENERALLY:

"The law provides a special basis of tax computation where sales are at less than the fair market price and not at arm's length. The fair market price is the price for which articles are sold by manufacturers at the place of distribution or sale in the ordinary course of trade and in the absence of special arrangements. A sale is not at arm's length when made pursuant to special arrangements between a manufacturer and a purchaser (as in the case of intercompany transactions). When a sale is not at arm's length and the price is less than the fair market price (as in the case of intercompany transactions at cost or at a fictitious price), the tax is to be computed upon a fair market price to be computed by the Commis-

sioner. No deduction from the fair market price as determined by the Commissioner is permissible.

"Where a manufacturer sells articles at retail, the tax on his retail sales ordinarily will be computed upon a price for which similar articles are sold by him at wholesale. However, in such cases it must be shown that the manufacturer has an established bona fide practice of selling the same articles in substantial quantities at wholesale. If he has no such sales at wholesale, a fair market price will be determined by the Commissioner.

"If a manufacturer sells regularly at wholesale at several varying but bona fide rates of discount, ordinarily his average selling price for the smallest wholesale lots will be the basis of tax with respect to retail sales. All sales at wholesale are subject to tax on the basis of the actual sale price of each article so sold.

"If a manufacturer delivers articles to a dealer on consignment, retaining ownership in them until disposed of by the dealer, the manufacturer must pay a tax on the basis of the fair market price, which will ordinarily be the net price received from the dealer."

No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. H. McCLINTOCK and FLORENCE L. McCLINTOCK, co-partners, doing business under the fictitious name and style of McCLINTOCK DISPLAY COMPANY,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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BRIEF FOR THE APPELLEE.

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No. 11587

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vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The only previous opinion in this case is the memorandum opinion of the District Court [R. 20-22], which is not reported.

Jurisdiction.

This appeal involves federal manufacturer's excise taxes. The taxes and interest thereon in dispute in the aggregate sum of $20,673.38 for the 13 months' period from October 1, 1941, to October 31, 1942, inclusive, were assessed by the Commissioner of Internal Revenue on the Miscellaneous List for January, 1943, on or about March 10, 1943, and were paid to the Collector of Internal Revenue on or about January 26, 1944. [R. 4, 24, 26.] A

claim for the refund thereof was filed on October 13, 1944 [R. 4-5, 7-17, 26], and was rejected by the Commissioner by notice dated April 16, 1945. [R. 5, 26.] On February 7, 1946, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayers brought suit in the District Court for recovery of the taxes and interest paid. [R. 2-17.] Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code, as amended. The judgment was entered on October 16, 1946, in favor of the Collector, dismissing the taxpayers' action, with costs. [R. 31-32.] The taxpayers' motion for a new trial, filed on October 24, 1946, was denied by the District Court on December 24, 1946. [R. 32-36.] Thereafter within three months the taxpayers' notice of appeal was filed on February 18, 1947. [R. 37.] The jurisdiction of this Court is invoked by the provisions of Section 128 (a) of the Judicial Code, as amended.

Question Presented.

Whether the "Rental Agreement" under which the taxpayers distributed the taxable rubber products manufactured by them to and for the use of their customers constituted a "lease * * * [which] shall be considered a taxable sale of such article" subject to the manufacturer's excise tax "on the price for which sold," as the District Court held and as we contend; or merely a transaction with their customers whereby the taxpayers themselves "used" such articles in the operation of their business so that only the fair market value of the articles so used was subject to tax, as the taxpayers contend.

Statute and Regulations Involved.

These are set forth in the Appendix, *infra*, pp. 1-6.

Statement.

The facts (including exhibits) were stipulated to a large extent between the parties [R. 51-56, 105-110], and also were adduced in part by testimony of the taxpayers' witnesses and their documentary evidence. [R. 40-111.] The pertinent facts, sufficient for the purposes herein, were found by the District Court substantially as follows [R. 23-29]:

At all times material herein, the taxpayers were and still are copartners doing business under the firm name of the McClintock Display Company. They have fully complied with the provisions of Sections 2466-2468 of the California Civil Code by filing a certificate of fictitious name with the County Clerk of Los Angeles County, California, and publishing it as required by law. [R. 23.] The taxes sued for herein were paid by the taxpayers to the defendant-appellee in his official capacity as the Collector of Internal Revenue for the Sixth Collection District of California who at all times material herein was such Collector. [R. 23-24.] During such time, the taxpayers were engaged in the business of manufacturing, selling and leasing certain rubber articles which were used for decorative purposes in numerous meat markets, delicatessens and similar establishments which were their customers. [R. 24.]

The taxpayers' total gross revenues of $234,869.23 realized from their business activities during the 13 months' period from October 1, 1941, through October 31, 1942, involved herein, constituted rentals received from their customers after the latter had entered into rental agreements with them. [R. 27.] All these rental revenues were derived from the taxpayers' use of a cer-

tain "Rental Agreement," a typical copy of which reads as follows [R. 27-28]:

Rental Agreement

McClintock Display Company, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

C20396 Los Angeles, Calif., October 1, 1941

Lessee X Super Market

2000 Connecticut Ave.,

Newark, New Jersey District

[X] New Contract
[ ] Added to
[ ] Picked Up
[ ] Contract Cancelled

Rubber Leaf

20—18" clips installed

20—18" R. L. @ 7¢—$1.40

Total Feet 30 Total 18"Units 20 [46]

	)	Amount
20 Total Holders Installed	)	:
	)	
Rubber Leaf Exchanged	)	:
	)	
Collected for 3 Month	)	:
	)	
Rent Payable in Advance	)	:
	)	Total Collected 4:20

Rent from 10-1-41 to 1-1-42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by.....Lessee

Form R-A Western Salesbook Co., 3049 1. 12 St., L. A., An. 10338 9751.

No other or further written or printed instruments were used by the taxpayers in deriving these revenues from their business activities. [R. 27.]

The manufacturer's excise taxes imposed herein and due on the transactions other than as the result of the outright sales of the rubber products made by the taxpayers were computed by the Commissioner of Internal Revenue in the aggregate amount of $21,351.76 on the basis of total gross revenue derived from the above-mentioned rental agreements in the aggregate sum of $234,869.23 for the taxable periods of October-December, 1941, and January-October, 1942. [R. 25.] Like taxes were also imposed, admittedly due and paid in the sum of $1,155.47 on the net dollar amount of the outright sales—other than from the rental agreements—of rubber products made by the taxpayers during those same taxable periods in the aggregate sum of $12,710.23. [R. 24-25.]

On March 10, 1943, the Commissioner assessed against the taxpayers the amounts of $22,507.23, $5,417.54 and $1,001.54 representing respectively taxes, penalties and interest for the period October 1, 1941, through October 31, 1942, with respect to the federal excise taxes on rubber articles imposed by Section 3406 (a)(7) of the internal Revenue Code (Appendix, *infra*). [R. 24.] On December 24, 1943, the Commissioner abated the penalty previously assessed in the sum of $5,417.54. On January 26, 1944, the taxpayers paid to the Collector $22,507.23 and $2,248.37 representing the foregoing taxes and interest accrued at the time of payment, respectively. On October 13, 1944, the taxpayers timely filed with the Collector a claim for the refund of such taxes and interest, as provided by law, which the Commissioner disallowed and rejected on April 16, 1945. [R. 26.]

The taxpayers do not contest the above assessment in so far as it relates to the taxes in the sum of $1,155.47 based on the total amount received by them from the outright sales of their rubber products to others in the aggregate sum of $12,710.23. They contest only that part of the assessment relating to taxes and interest assessed in the aggregate sum of $20,673.38 by reason of the leases made by them with their customers in respect of the rubber products which they manufactured as set forth in their complaint and the claim for refund annexed thereto. [R. 2-17, 24-25, 26.]

The taxpayers' outright sales of their decorative rubber products were made in areas where they were not equipped to render services in connection therewith. In other areas they made leases of the foregoing products to their customers in connection with which they rendered certain services, including the replacement of soiled or damaged decorations with either new or renovated units. These replacements occurred from time to time during the terms of the leases agreed upon with their customers and their replacements did not cause any change with respect to the rentals payable or the rental terms agreed upon in the various rental agreements. [R. 28-29.]

The taxpayers were the lessors and were not the users of the rubber products which were leased to their customers by the rental agreements. Such products were used by their customers who were the lessees thereof. In no instances did the taxpayers use the foregoing products which they manufactured. [R. 29.]

The taxpayers did not include the excise taxes in question on the articles rented by them in the rental charges therefor, nor did they collect the amounts of taxes there-

on from their customers regardless of whether the customers were vendees or lessees. [R. 29.]

Upon the basis of the foregoing facts, the District Court concluded as a matter of law and held that the taxes in question were properly assessed against and paid by the taxpayers on the ground that the rental agreements were leases which constituted taxable sales, and that therefore the revenues derived therefrom were taxable rentals within the meaning of the taxing statute. [R. 29-30.] It thereupon entered judgment in favor of the Collector accordingly [R. 31-32], from which the taxpayers appealed to this Court for review. [R. 37.]

Summary of Argument.

The rental agreements were leases which constituted statutory taxable sales of the taxpayers' rubber products subject to excise taxes on the total gross revenues derived therefrom. The court below found upon the evidence that the taxpayers were the lessors and not the users of the articles they manufactured and leased to their customers under the rental agreements, that the products were used by the customers who were the lessees thereof, and that the taxpayers never used such articles which they manufactured in the operation of their business. There is ample evidence to support these findings and they should therefore be affirmed upon review. The provisions of the rental agreement and the evidence clearly confirm the Commissioner's determination and the District Court's finding and conclusion that it was a lease, in both form and substance, according to the intention of the parties. The evidence shows that it contained all the essential elements of a valid lease—definite agreement as to the extent and boundary of the property leased, as to term, as

to price, and as to the time and manner of payment. Moreover, it is clear that the mere rendition of services in connection with the leased articles does not take the taxpayers' case out of the taxable category as there is no provision for exemption therefor under the statute.

Since the rental agreements constituted leases resulting in statutory taxable sales, the taxpayers' leased products were "used" only by their lessees, and therefore Sections 3441 (b) and 3444 (a) of the Internal Revenue Code are inapplicable. There is no basis for the taxpayers' contention that the court below erred in failing to construe Section 3441 (b) as prescribing the manner in which the tax should be computed in cases of sales other than at wholesale; in failing to construe Section 3441 (c) as prescribing the time of payment of the tax in the limited instances enumerated therein; and in determining that the taxpayers did not use their products in the operation of their business within the meaning of Section 3444 (a) of the statute. We have already shown that the rental agreements constituted leases within the meaning of the statute, that there were no sales but only leases herein, and that therefore both the Commissioner and the court below properly used the measure of tax as prescribed in such cases by Section 3441 (c)(1) of the Code. There is no basis for computing the tax on the fair wholesale market price under Section 3444 (a) for there were only leases involved herein and the taxpayers did not *use* their products in the operation of their business. The taxpayers were the lessors and therefore they could not have used the articles at the same time they were being used by their lessee-customers.

ARGUMENT.

The Rental Agreements were Leases Which Constituted Statutory Taxable Sales of the Taxpayers' Rubber Products Subject to Excise Taxes on the Total Gross Revenues Derived Therefrom.

The District Court found and held that the excise taxes in question were properly assessed upon the total gross revenues derived by the taxpayers during the thirteen-months' taxable period involved herein on the grounds that the taxpayers were not the "users" of the rubber products which they manufactured and leased to their customers under the rental agreements used by the taxpayers in the operation of their business. On the contrary, it held that the customers who were the leasees thereunder were the users of the articles, and that the rental agreements were leases which constituted statutory taxable sales with the result that the revenues derived therefrom were taxable rentals. [R. 20-30.] We submit that the court below was correct in so holding.

The issue presents primarily a question of fact as to whether the taxpayers' products were rented under leases to their customers which constituted statutory taxable sales for tax purposes, or were merely "used" by the taxpayers in the operation of their business,[1] within the meaning of the pertinent statute and regulations, as the

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[1]Another question involved in the court below was whether the taxpayers had included the manufacturer's excise taxes in the price of their rubber articles with respect to which they were imposed or had collected the amount thereof from any of their alleged vendees [R. 21], no recovery being available in such instances. Section 3443 (d) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 3443); Section 316.94, Treasury Regulations 46 (1940 ed.). The District Court found and held in the negative in respect to this question [R. 22, 29], and it is not involved in this appeal.

District Court stated. [R. 20.] We contend the former and the taxpayers claim the latter is correct.

In the first place, the taxpayers conceded below [R. 12-13, 26] and they do not dispute here that the excise taxes in the sum of $1,155.47 were properly assessed and collected on the gross receipts of $12,710.23 representing outright sales of their rubber products to others, as distinguished from the total gross revenues realized from the rentals thereof. [R. 24-25, 26, 52-53.] Accordingly, only the remaining total gross receipts of $234,869.23 which the taxpayers derived from the rental agreements and on which taxes and interest in the aggregate sum of $21,351.76[2] were assessed and collected [R. 25-26, 55], are in dispute (Br. 36). Moreover, the parties stipulated that the gross receipts from rentals of the taxpayers' products in the operation of their business constituted "Gross Revenue" [R. 55, 108], and that such revenues were derived from the taxpayers' use in their business of only the printed form of "Rental Agreement" in evidence and from no other or further written or printed instrument [R. 54-55, 57-58, 73, 82-83], as the District Court found. [R. 25, 27-28.] The issue is therefore narrowed to the determination of whether the aggregate amount of the admitted "Gross Revenue" received by the taxpayers under that single document which constituted a lease must be considered a statutory "taxable sale" subject to tax on the total gross price for which the taxpayers' articles were thus leased.

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[2]Of this sum, only $20,673.38 thereof, representing taxes of $18,795.77 and interest thereon of $1,877.61, is involved in this case [R. 6, 8], as heretofore shown.

A. The "Rental Agreement" Was a Valid Lease Which Constituted a Statutory Taxable Sale.

Determinative of this issue is the question whether the rental agreement under which the taxpayers distributed and serviced the taxable rubber articles manufactured by them to and for the use of their customers constituted a "lease * * * [which] shall be considered a taxable sale of such article," within the meaning of Section 3440 of the Internal Revenue Code, as amended (Appendix, *infra*). If it did, and since the taxpayers conceded that the rubber products in question were taxable articles within the meaning of the taxing statute [R. 5] (Br. 8, 29, 32, 33), it follows that the manufacturer's excise tax of 10% on the articles so leased must be imposed and computed on the total gross "price for which sold," under the provisions of Section 3406 (a)(7)[3] and 3441 (c)(1) of the Code as amended (Appendix, *infra*), as interpreted by Sections 316.5 and 316.9, as amended, of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*).

The Commissioner of Internal Revenue determined that the entire amount of the gross revenues received from rentals of the taxpayers' products was subject to the excise tax under the provisions of Sections 3406(a)(7), 3440 and 3441 (c)(1) of the Internal Revenue Code, as amended. [R. 4, 12, 24.] Whether the articles manufactured by the taxpayers were rented to their customers

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[3]The manufacturer's excise tax imposed on the sales of rubber articles by Section 3406(a)(7), added to the Internal Revenue Code by Section 551 of the Revenue Act of 1941, was terminated by Section 611 of the Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1940 ed., Supp. V, Sec. 3406, note), Section 601 of which made it inapplicable to such sales after November 1, 1942. [R. 56.]

or were merely "used" by the taxpayers—as distinguished from the customers—in the operation of their business, is primarily a question of fact, as the District Court held. [R. 20.] It is apparent that the taxpayers, under the facts herein, have not met the required burden of overcoming the Commissioner's determination, as they must in order to prevail. *General Utilities Co. v. Helvering,* 296 U. S. 200, 206; *Helvering v. Rankin,* 295 U. S. 123, 131; *Phillips v. Commissioner,* 283 U. S. 589. It is settled that the burden is on the taxpayer, seeking to recover the tax erroneously exacted, to prove the facts establishing the invalidity of the tax. *United States v. Anderson,* 269 U. S. 422. This the taxpayers have failed to do.

The evidence and the construction of the rental agreement show that the parties intended to and did create a lessor-lessee relationship. Thus the evidence shows and the District Court found that the taxpayers' rubber products—other than those sold outright—were distributed to their customers under the rental agreements, and that the taxpayers' representatives changed the articles about every 60 to 90 days, or oftener upon request, and replaced with new ones the soiled, damaged, destroyed and useless articles usually to the extent of approximately 50% thereof during such periods. [R. 28, 61, 71, 74.] (Br. 4.) No additional charge was made for such periodic replacements made from time to time as agreed upon with the customers under the terms of the leases [R. 75] (Br. 5), and they did not affect the amounts of rentals payable or the various terms agreed upon in the rental agreements. [R. 28-29.] Moreover, the only form of rental agreement used by the taxpayers shows that they were the "Lessor"; the customer was the "Lessee"; the agreement was a "New Contract" for "Rent Payable in Advance" at a specified

price ($4.20) which was "Collected for 3 Month" in advance as "Rent from 10-1-41 to 1-1-42" and was "Received [as] Rent" by the taxpayers' representative; the "Merchandise installed is the property of" the taxpayers; that "This lease is revocable by" the taxpayers "or lessee" upon 10 days written notice; and the contract was "Accepted by" the customer as the "Lessee." [R. 27-28, 57-58, 73, 82-83.]

Upon these facts the District Court found that the taxpayers were the lessors and not the users of the rubber products which they manufactured and leased to their customers under the rental agreements, that the products were used by the taxpayers' customers who were the lessees thereof, and that the taxpayers in no instances used such products which they manufactured in the operation of their business. [R. 29.] Such findings, supported by substantial evidence, as herein, will not be disturbed but should be affirmed upon review by this Court. *McCaughn v. Real Estate Co.,* 297 U. S. 606, 608; *Helvering v. Nat. Grocery Co.,* 304 U. S. 282; *Helvering v. Kehoe,* 309 U. S. 277; *Wilmington Co. v. Helvering,* 316 U. S. 164.

It is apparent that under the facts as found, therefore, the rental agreement in question constituted a valid lease for tax purposes within the meaning of the statute and the pertinent Regulations. The statute specifies a "lease of an article" and includes any renewal or extension thereof or subsequent lease of such article. Section 3440, Internal Revenue Code, as amended. If the rental agreement was a lease at all, therefore, these additional statutory provisions clearly embrace the taxpayers' subsequent replacements of the soiled, damaged, or destroyed and discarded articles with renovated or new units from time to time [R. 28] (Br. 4-6), as renewals or extensions of the

previous leases or subsequent leases of the articles, respectively. The taxpayers themselves admit that the rental agreement was a lease at times. Thus, in their motion for a new trial, they stated that the rental agreement was used from time to time for accounting purposes "and was not used *exclusively* and at all times as a 'lease.'" (Italics supplied.) [R. 33.] They do not deny, therefore, but admit by implication that the agreement *was* used at times as a lease. The Regulations define the term "lease" as used in Section 3440 to mean the continuous right of the lessee to the possession or use of a particular article, without interruption, for a period of time and not merely as occasion demands. Section 316.9, Treasury Regulations 46 (1940 ed.), as amended. Under the broad scope of this definition, the rental agreement was clearly a lease and not a sales contract and, in harmony with the authorities, it contradicts the taxpayers' contention that its language precludes a holding that they "leased" their products. (Br. 13.) This is borne out by rulings of the Treasury Department that a lease comes within the purview of the excise tax statute providing that it must be considered a taxable sale where the manufacturers of rubber products retained title to but agreed to furnish tires and inner tubes to operators of some bus companies and to service them at specified rates per mile, within the meaning of Sections 602 and 618 of the Revenue Act of 1932, c. 209, 47 Stat. 169 (substantially like Sections 3406(a)(7) and 3440 of the Internal Revenue Code herein). G. C. M. 11410, XII-1 Cum. Bull. 382-384 (1933). That ruling is cited by the taxpayers for the proposition that leases are taxable only if sufficiently similar to sales which they allege is not true of the rental agreement herein. (Br. 28-29.) The facts show, however, that there were only leases

involved in the taxpayers' transactions with their customers, and therefore it is apparent that the Commissioner and the Court below properly invoked the measure of the tax as prescribed by Section 3441(c)(1) of the Code which alone applies in the case of "a lease."

Apropos of the rental agreement herein, several apt definitions of leases are given in that Treasury ruling. Thus, a lease is defined as nothing but a contract which is governed by the same rules which govern other contracts. *Hinsdale v. McCune,* 135 Ia. 682. It imports a contract by which a person divests himself and another takes possession of lands or chattels for a term. *Moorshead v. United Railways Co.,* 203 Mo. 121. A lease has been defined as a grant for a stated period of the use and possession or something in consideration of something to be rendered. *Coney Island Co. v. M'Intyre-Paxton Co.,* 200 Fed. 901 (C. C. A. 6th). It is necessary to the relationship of landlord and tenant that a reversionary interest remain in the former; otherwise there is an assignment rather than a lease. *Kavanaugh v. Cohoes Power & Light Corp.,* 187 N. Y. Supp. 216. The word "lease" is commonly applied to certain kinds of contracts, some of which amount to conditional sales and others to a bailment for use, under which goods are delivered by one person to another. *Cadwallader v. Wagner,* 7 Kulp (Pa.) 465, 466. These definitions show quite clearly that the articles delivered by the taxpayers to their customers under the rental agreement were leased and that the latter's possession of the articles constituted a bailment for use, the soiling or destruction of the articles during such use being immaterial in that most personal property is worn out and depreciated by use over a short or long period of time. *Cadwallader v. Wagner, supra.* The fact that the tax-

payers, under the rental agreement, had to supply renovated or new articles from time to time as the previously leased units became no longer usable is also immaterial in that the customers kept them under bailment for use and the taxpayers still retained title thereto. [R. 28, 57-58, 73, 83.] The leases accomplished by the rental agreement are within the purpose of the statute (Section 3441 (c)(1)(A)), and are made taxable because of their similarity to sales (Section 3440). Leases were made taxable in the Revenue Act of 1924, c. 234, 43 Stat. 253, because bailers frequently disposed of their goods under a form of contract termed a "lease" which in reality was a contract of sale with payments by installments. S. Rep. No. 398, 68th Cong., 1st Sess., p. 41 (1939-1 Cum. Bull. (Part 2) 266, 294), *re* Section 704 (a), which became Section 604 (a) of the Revenue Act of 1924. Section 618 of the Revenue Act of 1932, providing that the lease of an article shall be considered to be a sale thereof, was retained in the law to prevent evasion of the tax by a lease contract which does not involve the passage of title. S. Rep. No. 665, 72nd Cong., 1st Sess., p. 44 (1939-1 Cum. Bull. (Part 2) 496, 528), *re* "Section 616 of the House bill, retained as Section 605," which became Section 618 of the Revenue Act of 1932. Accordingly, the rental agreement under which the taxpayers' customers had possession and use of the articles over specified periods of time in consideration of the rentals paid therefore, constituted a lease within the intent of Section 3440 of the Internal Revenue Code, as amended, and therefore are taxable sales under Section 3406(a)(7), as amended.

Contrary to the taxpayers' contentions that the rental agreement was not a lease in the legal sense (Br. 10-11), or of the type contemplated by Congress when it inserted

the word "lease" in Section 3440 (Br. 12-21), the history of the taxing statutes involving leases shows quite plainly a Congressional intention to tax manufactured articles that are sold or leased. Thus the current provisions of the Internal Revenue Code (Sections 3440, 3441, 3442, as amended by Secs. 553 and 307 (a)(5), respectively, of the Revenue Acts of 1941 and 1943, c. 63, 58 Stat. 21 (26 U. S. C. 1940 ed., Supp. V, Sec. 3442), and 3444 (Appendix, *infra*) show a Congressional purpose of anticipating and preventing tax avoidance by the application of the manufacturer's excise taxes to all transactions involving the disposition, lease or use of taxable manufactured articles (with the exception, of course, of tax free sales under Section 3442, as amended). To this end Section 3406(a)(7) imposes the tax on the sale of any taxable article, and Section 3440 imposes the tax on all articles leased instead of sold by providing that the lease of the article shall be considered a taxable sale. Further provision was made in Section 3441(b), as amended, that the tax shall be applied whether the article is sold at retail, on consignment, or sold—otherwise than through an arm's length transaction—at less than the fair market price. Likewise, it is specifically provided in Section 3441(c)(1), as amended, that the tax shall apply in case of a lease, as herein, an installment sale where title does not pass until later, a conditional sale, or a chattel mortgage arrangement providing for installment payments. Thus Congress clearly intended to tax all possible dispositions by sale, lease or otherwise which the manufacturer might make in deriving revenues from his products. In addition thereto, Congress enacted Section 3444 to cover a case where the manufacturer did not dispose of the product by lease or otherwise but elected personally

to use it. It provided therein that if any person manufactures and *uses* the article (other than as material in the manufacture of another taxable article to be manufactured or sold tax-free), the tax is measured by the price at which such or similar articles are sold in the ordinary course of trade by the manufacturer, as determined by the Commissioner. Since the articles herein were actually used by the taxpayers' lessee-customers rather than by the taxpayers themselves, the Commissioner and the Court below could not legally apply the measure of the tax—on the fair wholesale market value of the articles so used (Section 316.7 of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*)—provided in Section 3444 but properly applied to the tax measure contained in Section 3441(c)(1) (in the case of a lease), based upon the total rental payments received by the taxpayers under the rental agreement. Moreover, just as the taxpayers state that the excise tax has been imposed on articles "sold or leased" since the enactment of Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057 (Br. 13), Congress has consistently imposed and retained such taxes on leases—except for the four-years' hiatus between the repeal in the 1928 Act and the re-enactment thereof in the 1932 Act—in order to prevent evasion of taxes by lease contracts. S. Rep. No. 398, 68th Cong., 1st Sess., p. 41 (1939-1 Cum. Bull. (Part 2) 266, 294) *re* 1924 Act; S. Rep. No. 665, 72nd Cong., 1st Sess., p. 44 (1939-1 Cum. Bull. (Part 2) 496, 528) *re* 1932 Act.

This lengthy history of taxing a lease as a taxable sale, we submit, readily negatives the taxpayers' contention that the rental agreement is not the kind of lease which Congress intended to be taxed under Section 3440 of the Internal Revenue Code, as amended. (Br. 12-21.) The

taxpayers have cited no authority whatever showing that any lease has ever been excluded from the scope of the taxing statute, and since Congress has never provided for any such exclusions, it is apparent that there is no basis for limiting the terms of the statute to provide an exception in the case of the taxpayers' rental agreement as a particular type of lease entitled to exemption. The provisions of the statute show quite plainly that Congress, having made no exceptions, intended to tax *all* leases. Application of the general rule of giving the instrument its ordinary meaning, therefore, leads inescapably to the conclusion that the rental agreement was a valid lease which must be considered a taxable sale under the explicit and unambiguous language of Section 3440 of the Code.

The provision and terms of the rental agreement and the evidence clearly confirm the Commissioner's determination and the District Court's finding and conclusion that it was a lease, in both form and substance, according to the intention of the parties. [R. 12, 24, 27-28, 61, 74.] They plainly show that the taxpayers and the customer both intended and considered that the original instrument or the renewal thereof was a lease of the article distributed and serviced thereunder. The instrument denominates the parties as lessor and lessee, respectively, and contains all the essential elements of a lease. [R. 27-28, 57-58, 73, 82-83.] The facts show affirmance and intention on the part of the taxpayers of the lessor-lessee relationship in dealing with their customers and that they insisted that the latter assume the role of and remain lessees. Thus we have the several points of mutual agreement necessary to establish a valid lease—definite agreement as to the extent and boundary of the property

leased, definite and agreed term, definite and agreed price of rental, and the time and manner of payment—as set forth in *Levin v. Saroff,* 54 Cal. App. 285, cited by the taxpayers. (Br. 11.) These facts also negative the taxpayers' contention that because they changed the articles from time to time under the rental agreement[4] (Br. 7-8, 10-11, 12-13), the agreement was not a lease in the legal sense for the customers allegedly had no right of possession and use of the particular articles, without interruption, for a period of time, as prescribed by the Regulations and as contemplated by Congress in Section 3440. (Br. 10-21.) The taxpayers have cited no facts or authority whatever to show or indicate that the title and unambiguous terms of the rental agreement, prepared and formulated by them and not by the customers, establish that a lease was not intended by the parties, as plainly indicated therein, or that any other relationship than that of lessor-lessee was intended. Moreover, contrary to the taxpayers' contention that the rental agreement was not a lease because it allegedly did not cover any specific property or type of property (Br. 10-11), the evidence shows that the property was clearly and specifically identified as follows [R. 27]: "Rubber Leaf 20-18" clips installed" and "20-18" R. L. @ 7¢-$1.40." Even if it had not been thus specifically identified, however, the agreement nevertheess contained all the essential

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[4]It will be noted that many of the facts, as stated by the taxpayer (Br. 4-8), are argumentative.

elements of a lease (G.C.M. 11410, XII-1 Cum. Bull. 382, 384 (1933)), as heretofore shown.

The taxpayers contend that the rental agreement was merely a service ticket and that the rentals paid thereunder were service charges with the result that the agreement fails to measure up to a lease in the legal sense. (Br. 5-7, 10-21.) The facts, however, show otherwise. We have already shown that the rental agreement alone constituted a lease according to the obvious intention of the parties. In addition thereto, the existence of such intention is shown by the taxpayers' continuous and indiscriminate references and terminology characterizing and relating to a lease before and up to the time the action herein was filed. Thus, in the claim for refund, filed approximately 16 months before the suit [R. 2-17], they stated that their organization was "engaged in the business of renting and selling" their products [R. 9]; that they "rented" the products which were "out on rent" to their customers for which "rentals" were charged [R. 10]; and such lease terms were used consistently throughout the statement attached to the claim. [R. 9-12.] Likewise, such terms were used repeatedly in the schedules attached to the refund claim showing the "Number of Units on Rental First of Each Month" running into the hundreds of thousands, for example [R. 17], and that the taxpayers regularly maintained a "Rental Department" [R. 13-14.] Like or similar terms were also used variously in the taxpayers' complaint filed herein [R. 5, par. 10] and in the stipulation of facts [R. 53-54, Par. V],

and the rental of the taxpayers' leased articles was recognized and admitted affirmatively in the testimony given by one of the taxpayers' witnesses.[5] [R. 61.] Finally, the taxpayers now admit that they (Br. 35), "as owners of rubber leaf decorations, devoted those decorations to *rental* purposes * * *." (Italics supplied.) These facts, of themselves, we submit, amply support the District Court's finding and conclusion that the taxpayers were the lessors of the products which they leased to their customers and therefore the rental agreement used by them constituted a lease, the revenues from which were taxable rentals. [R. 29-30.]

The foregoing negatives the taxpayers' contention that the amount of gross revenues received under the rental agreement was not rentals from leases but was for services rendered with respect to the decorative articles installed and regularly serviced by its representatives who replaced the soiled and damaged decorations with renovated or new units periodically in the business establishments of their various customers. (Br. 4-8, 12-21.) In this connection the court below found that although, in a sense, the taxpayers were rendering services because almost any rented article requires a certain amount of servicing, nevertheless they were, at the same time, disposing of a portion of their products by this method of service for they were thereby creating a demand which resulted in renting their products on written rental agreements in-

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[5]The taxpayers' witness and general sales manager, Everett C. McClintock, in answer to the District Court's question, "In other words, you *rent* these [articles] and render a service with them?" answered "Yes"; and to the question, "That is part of the service that you furnish when you *rent* these decorations?" the witness replied, "That is right." (Italics supplied.) [R. 61.]

stead of selling them, and that therefore the evidence established the fact that the taxpayers' products were rented and re-rented to their trade. [R. 22.] It is the usual and customary practice, of course, for the manufacturing lessor of taxable articles in many cases to service them with or without additional charge to the lessee, but the rendition of such services does not make the rentals received therefrom exempt from tax any more than it would make the sales prices exempt on products serviced by the vendor for the vendee. This is true in the case of many kinds of business and office machines, for example, many of which require constant servicing from time to time by the vendors or lessors but nevertheless are taxable on the price for which sold.[6] A good example thereof is the sale of typewriters which require frequent servicing thereafter by the vendor without any exemption from tax of the proceeds of sale on that account, as pointed out by the court below in the colloquy with one of the taxpayers' witnesses. [R. 62.]

Quite clearly, therefore, the mere rendition of services does not enable the manufacturer of the product to escape the excise tax thereon, and it is fair to assume that if Congress had intended that lessors and vendors were entitled to tax exemption merely by giving their customers certain services with or without charge, it would undoubtedly have so provided in the statute. It is noteworthy in this connection that the statute imposes the tax on a lease of a commodity as a taxable sale without pro-

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[6]See Section 3406(a)(6) of the Internal Revenue Code, as added by Section 551 of the Revenue Act of 1941, providing for the imposition of such excise taxes on many kinds of "Business and store machines" sold by the manufacturer or producer.

viding for any exemption whatever for services rendered in connection therewith. It grants exemptions only in such cases as tax-free sales or articles for use by the vendee as material in the manufacture of other articles taxable thereunder or for resale to other manufacturers, for example,[7] but no exemption is provided in the case of services rendered, with or without charge, in connection with the product sold or leased.

Although the taxpayers may have rendered services to an unusual degree, as contended (Br. 4-6, 8), there is nothing in the taxing statute authorizing or allowing segregation and allocation of the rentals paid by their customers as between rentals and services. Even if there were, the taxpayers would be in no position now to take advantage thereof because the issue was not raised or tried in the court below [R. 2-17], nor was it timely raised in the claim for refund filed with the Commissioner [R. 7-17], as would have been required in order for the taxpayers to prevail in a suit for the recovery of federal taxes. Section 3772 (a), Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 3772; Sections 29.322-3 and 29.322-7 of Treasury Regulations 111, promulgated under the Internal Revenue Code; *Angelus Milling Co. v. Commissioner,* 325 U. S. 293; *United States v. Felt & Tarrant Co.,* 283 U. S. 269; *Dascomb v. McCuen,* 73 F. (2d) 418 (C. C. A. 2d); *Taber v. United States,* 59 F. (2d) 568 (C. C. A. 8th). Moreover, in so far as the

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[7]Section 3442 of the Internal Revenue Code, as amended by Section 553 of the Revenue Act of 1941 and Section 307(a)(5) of the Revenue Act of 1943. In such cases, of course, the taxpayers must establish proof of the right to exemption. Section 316.23 of the Treasury Regulations 46 (1940 ed.).

record shows, it is apparent that the selling price of the taxpayers' leased products, stipulated to have been an average of $.37945 per unit [R. 52], included the cost of all the services rendered in connection therewith by the taxpayers to their customers during the period of each lease for they assert that no additional charge was made therefor. (Br. 5.) In any event, the customers got the use of the taxpayers' articles and the concomitant services under the rental agreements and the taxpayers received full compensation therefor approximating, it may be assumed in the absence of evidence to the contrary, the total sales price of the units installed. The history of the excise tax laws given by the taxpayers (Br. 12-17) furnishes no basis, and they cite no authorities, to support an exemption from the tax by reason of the rendition of services in connection with the leases of their manufactured products. Certainly G. C. M. 11410, XII-1 Cum. Bull. 382-384 (1933), relied upon by the taxpayers (Br. 26-29), lends no support thereto.

People's Outfitting Co. v. United States, 58 F. (2d) 847 (C. Cls.), relied on by the taxpayers (Br. 14-15, 16), is not in point for it involved the question whether a certain document should be construed as a conditional sale or as a lease. There the court held that the transactions constituted conditional sales of jewelry and not leases, and therefore no excise tax was payable under Section 604 of the Revenue Act of 1924 where the final payment was not made before February 26, 1946, the date of the enactment of the Revenue Act of 1926. There is nothing in that case to support the taxpayers' contention (Br. 16) that although the transaction was called a lease in the statute, what was actually intended was a lease which amounted to a sale.

Likewise, *Indian Motorcycle Co. v. United States,* 283 U. S. 570, cited by the taxpayers (Br. 20-21), does not help. The Court held there that under the principle that the instrumentalities, means and operations whereby the several States exerted their governmental powers are exempt from taxation by the United States, the sale of motorcycle to a municipal corporation for use in its police service was not subject to the excise tax under Section 600 of the Revenue Act of 1924. Thus that case involved a sale, not a lease, and is therefor not applicable herein.

Gould v. Gould, 245 U. S. 151, relied on by the taxpayers (Br. 16), is not in point. That case involved the question whether certain income was taxable or nontaxable and the Court decided to resolve the doubt in favor of the taxpayer and against the Government. Since the taxpayers concede taxability of the rubber articles herein (Br. 8, 29, 32, 33), and merely the correct *measure* of the tax is involved, the principle enunciated in the *Gould* case is inapplicable.

Accordingly, we submit that the rental agreements were leases which constituted statutory taxable sales of the taxpayers' rubber products subject to excise taxes on the total gross revenues derived therefrom, within the meaning of Sections 3406 (a)(7), 3440, and 3441 (c)(1) of the Code, as amended, as interpreted by Sections 316.5 and 316.9, as amended, of Treasury Regulations 46 (1940 ed.).

B. Since the Rental Agreements Constituted Leases Resulting in Statutory Taxable Sales, the Taxpayers' Leased Products Were "Used" Only by Their Lessees, and Therefore Sections 3441(b) and 3444(a)(1) of the Internal Revenue Code Are Inapplicable.

The taxpayers contend that the District Court erred in failing to construe Section 3441 (b) of the Internal Revenue Code, as amended, as prescribing the manner in which the tax should be computed in the case of taxable sales other than at wholesale, and to construe Section 3441 (c) as prescribing the time of payment of the tax in the limited instances enumerated therein. (Br. 22-33.) They also claim that it erred in determining that the taxpayers did not "use" their products in the operation of their business, within the meaning of Section 3444 (a)(1) of the Code, as amended. (Appendix, *infra*.) (Br. 33-36.)

Contrary to the taxpayers' contentions, however, we have already shown that the rental agreements constituted leases within the meaning of the statute, and that the District Court so found and held upon the evidence. We have also shown that there were no sales but only leases herein, and that therefore both the Commissioner and the court below properly used the measure of tax as prescribed in such cases by Section 3441 (c)(1), which specifically applies to lease transactions. Accordingly, since there were no sales involved in the taxpayers' transactions with their customers, Section 3441 (b) cannot be held applicable to the facts herein. That section provides only for the computation of the tax on the basis of the

price for which sold in cases of articles which are sold at retail, or on consignment, or sold (otherwise than through an arm's length transaction) at less than the fair market price, none of which is involved herein. Moreover, only in cases of sales at less than the fair market price and not at arm's length or on consignment, is the tax computed on the basis of the fair market price. Section 316.15 of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*). Thus there is no basis, and the taxpayers cite no authority, for the contention that the tax should be measured and computed under the provisions of Section 3441 (b) instead of under Section 3441 (c) of the Code, as the taxpayers urge.

Neither is there any basis or authority shown for the contention that the tax should be computed on the basis of the fair wholesale market price under Section 3444 (a)(1) on the ground that the taxpayers manufactured and allegedly used their products in their business. We have already shown that the rental agreements constituted leases within the meaning of the statute and regulations, and that the District Court found upon the evidence and held that the taxpayers were the lessors and not the users of the products leased to their customers under the rental agreements, but that they were used exclusively by their customers who were the lessees thereof. [R. 29.] Quite clearly since the taxpayers were the lessors, they could not also have been, at the same time, the users of the products. The facts show that the customer, as lessee, paid the rental for the possession and use of the articles for the period designated in the lease, and therefore he was obviously the one who was entitled to the use thereof and who actually used it, as provided in the statute. (Section 3444 (a)(1).) Only "If a person manufactures

* * * an article * * * and uses it for any purpose" other than as material in the facture of another article which will be taxable or sold tax-free under the statute, "in the operation of a business in which he is engaged," does "the use" thereof make him liable for tax thereon which "will be computed on the basis of the fair market price of the article." Section 316.7, Treasury Regulations 46 (1940 ed.) (Appendix, *infra*). This, of course, excludes the taxpayers' case from coming within the provisions of Section 3444 (a)(1) in that they could not have been using the articles in the operation of their business at the same time that the lessees were using them in *their* business for the duration of the leases. The taxpayers' claim that they were users of the articles, therefore, is clearly erroneous for they were merely the manufacturers thereof and the lessees were the users under the leases. Consequently, the Commissioner and the court below had no alternative than to determine and hold that the tax was properly imposed on the total gross rentals and due, paid and collected under the provisions of Sections 3406 (a)(7), 3440, and 3441 (c)(1)(A) of the Internal Revenue Code, as amended, as heretofore shown.

The taxpayers' contention (Br. 33-35) that they are liable for the tax based upon only the fair wholesale market price but not upon the total gross revenues received from the lessees, is not supported by the cases relied upon by them, namely, *Kittredge v. Commissioner,* 88 F. (2d) 632 (C. C. A. 2d); *Yellow Cab Co. v. Driscoll,* 24 F. Supp. 993 (W. D. Pa.); and *Fackler v. Commissioner,* 45 B. T. A. 708, affirmed, 133 F. (2d) 509 (C. C. A. 6th). Those cases are clearly distinguishable

for they did not involve leases as herein. They related to claimed deductions for depreciation of property used in the taxpayers' trades or businesses, or devoted to rental purposes exclusively for the production of taxable income in the business, under the income tax laws. Therefore, the taxpayers' claimed analogy of those cases to the present case involving the alleged use of their manufactured products in their trade or business under Section 3444 of the Code herein, is neither apparent nor persuasive.

Such cases as *Lippman's, Inc. v. Heiner,* 41 F. (2d) 556 (W. D. Pa.); *Carter v. Slavick Jewelry Co.,* 26 F. (2d) 571 (C. C. A. 9th), and *People's Outfitting Co. v. United States,* 58 F. (2d) 847 (C. Cls.), relied on by the taxpayers (Br. 25-26), are not in point. The *Lippman's, Inc.* and *Carter* cases involved questions as to whether or not the taxes *attached* on the leased and conditionally sold properties, respectively, where the taxpayers were required to pay the taxes on sums not yet collected from their customers. Therefore, they bear no similarity whatever to the collection of the tax herein on only the actual gross rentals which the taxpayers had collected from their customers without being required to pay taxes on any sums uncollected. Likewise, the *People's Outfitting* case is inapplicable for it involved the question whether a certain document should be construed as a conditional sale or as a lease, as heretofore shown. There is no question of a distinction between two instruments herein but

merely whether the taxpayers' rental agreements constituted leases, and we have already shown that they did under the facts herein.

Accordingly, since the rental agreements constituted leases resulting in statutory taxable sales, it follows that the taxpayers' leased products were used only by their lessees and therefore Sections 3441 (b) and 3444 (a)(1) of the Internal Revenue Code, as amended, are inapplicable.

Conclusion.

The judgment of the District Court is correct and in accordance with law and the authorities. It should therefore be affirmed upon review by this Court.

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APPENDIX.

Internal Revenue Code:

Sec. 3406 [as added by Section 551 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941.

(a) *Imposition.*—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

* * * * * * * *

(7) *Rubber articles.*—Articles of which rubber is the component material of chief weight, 10 per centum. The tax imposed under this paragraph shall not be applicable to footwear, articles designed especially for hospital or surgical use, or articles taxable under any other provision of this chapter.

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(26 U. S. C. 1940 ed., Supp. V, Sec. 3406.)

Sec. 3440 [as amended by Section 553 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. DEFINITION OF SALE.

For the purposes of this chapter the lease of an article (including any renewal or any extension of a lease or any subsequent lease of such article) by the manufacturer, producer, or importer shall be considered a taxable sale of such article.

(26 U. S. C. 1940 ed., Supp. V, Sec. 3440.)

Sec. 3441 [as amended by Section 549 of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 618 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. SALE PRICE.

(a) In determining for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

(c)(1) In the case of (A) a lease, (B) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, (C) a conditional sale, or (D) a chattel mortgage arrangement wherein it is provided that the sales price shall be paid in installments,

there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 3441.)

Sec. 3444 [as amended by Section 553 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. USE BY MANUFACTURER, PRODUCER, OR IMPORTER.

(a) If—

(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio taxable under section 3404) and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of section 3442, relating to tax-free sales); or

* * * * * * * *

he shall be liable for tax under this chapter in the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 3444.)

Treasury Regulations 46 (1940 ed.), relating to Excise Taxes on sales by the manufacturer under Chapter 29, subchapter A, of the Internal Revenue Code:

Sec. 316.5 [as amended by T. D. 5189, 1942-2 Cum. Bull. 226]. *When tax attaches.*— * * *

* * * * * * * *

In the case of a lease, an installment sale, a conditional sale or a chattel mortgage arrangement, a proportionate part of the tax attaches to such payment. (See section 316.9.) In the case of use by the manufacturer (see section 316.7) the tax attaches at the time the use begins.

Sec. 316.7. *Tax on use by manufacturer, producer, or importer.*—If a person manufactures, produces, or imports an article covered by these regulations, except a tire or inner tube, and uses it for any purpose (other than as material in the manufacture or production of, or as a component part of, another article manufactured or produced by him which will be taxable or sold free of tax under the provisions of section 316.21 or 316.22), he shall be liable for tax with respect to the use of such article in the same manner as if it were sold by him.

* * * * * * * *

The use by any person, in the operation of a business in which he is engaged, of any taxable article which has been manufactured, produced, or imported by him or his agent, makes such person liable to tax on such use. Except in the case of tires and inner tubes the tax will be computed on the basis of the fair market price of the article. (See section 316.15.) However, the tax on the use of such taxable article will not attach in cases where an individual incidentally manufactures, produces, or im-

ports for his personal use or causes to be manufactured, produced, or imported for the personal use any taxable article.

Sec. 316.9 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267, 270]. *Basis of tax on leases, installment sales, and conditional sales.*—Special provision is made in the law for computing taxes due in the case of losses of articles and installment and so-called conditional sales. The term "lease" means a continuous right to the possession or use of a particular article for a period of time. It does not include the use of an article merely as occasion demands, but the contract must give the lessee the right to possess or use the article, without interruption, for a period of time.

Where articles are leased by the manufacturer, or sold under an installment-payment contract with title reserved, or under a conditional-sale contract with payments to be made in installments, a proportionate part of the total tax shall be paid upon each payment made with respect to the article. The tax must be returned and paid to the collector during the month following that in which such payment is made.

* * * * * * * *

Sec. 316.15. *Fair market price in case of retail sales, consignments, etc., generally.*—The law provides a special basis of tax computation where sales are at less than the fair market price and not at arm's length. The fair market price is the price for which articles are sold by manufacturers at the place of distribution or sale in the ordinary course of trade and in the absence of special arrangements. A sale is not at arm's length when made pursuant to special arrangements between a manufacturer

and a purchaser (as in the case of intercompany transactions). When a sale is not at arm's length and the price is less than the fair market price (as in the case of intercompany transactions at cost or at a fictitious price), the tax is to be computed upon a fair market price to be computed by the Commissioner. No deduction from the fair market price as determined by the Commissioner is permissible.

Where a manufacturer sells articles at retail, the tax on his retail sales ordinarily will be computed upon a price for which similar articles are sold by him at wholesale. However, in such cases it must be shown that the manufacturer has an established bona fide practice of selling the same articles in substantial quantities at wholesale. If he has no such sales at wholesale, a fair market price will be determined by the Commissioner.

If a manufacturer sells regularly at wholesale at several varying but bona fide rates of discount, ordinarily his average selling price for the smallest wholesale lots will be the basis of tax with respect to retail sales. All sales at wholesale are subject to tax on the basis of the actual sale price of each article so sold.

If a manufacturer delivers articles to a dealer on consignment, retaining ownership in them until disposed of by the dealer, the manufacturer must pay a tax on the basis of the fair market price, which will ordinarily be the net price received from the dealer.

No. 11589

United States

Circuit Court of Appeals

For the Ninth Circuit.

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 6-4-47—60

No. 11589

United States

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For the Ninth Circuit.

VINCENT BRUNO,

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NAMES AND ADDRESSES OF ATTORNEYS

MR. WALTER H. DUANE,
790 Mills Building,
San Francisco, California,

Attorney for Defendant and Appellant.

MR. FRANK J. HENNESSY,
United States Attorney,
Northern District of California,

MR. JAMES T. DAVIS,
Assistant United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California

INDICTMENT

First Count
(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

In the March, 1946, term of said Division of said District Court, the Grand Jurors thereof on their oaths, present:

That Vincent Bruno (whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, hereinafter called "said defendant"), on or about the 20th day of August, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle, containing approximately 30 grains of heroin.

Second Count
(Jones-Miller Act, 21 U.S.C. 174)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That at the time and place mentioned in the first count of this indictment, within said Division and District, said defendant fraudulently and knowingly did conceal and facilitate the concealment of said certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly de-

scribed as one bindle, containing approximately 30 grains of heroin, and the said heroin had been imported into the United States of America contrary to law as said defendant then and there knew.

/s/ FRANK J. HENNESSY,
United States Attorney.

Approved as to form:
R. B. McM.

[Endorsed]: A true bill,
HAROLD C. CLOUDMAN,
Foreman.

Presented in open Court and ordered filed March 20, 1946. C. W. Calbreath, Clerk; by Edward E. Mitchell, Deputy Clerk.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 27th day of March, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 30078

UNITED STATES OF AMERICA

vs.

VINCENT BRUNO.

ARRAIGNMENT OF DEFENDANT

This case came on regularly this day for arraignment. The defendant Vincent Bruno was present in proper person and with his attorney, Walter Duane, Esq. E. H. Henes, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Henes, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the

person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was informed of the charge against him. Mr. Duane waived the reading of the Indictment.

On motion of Mr. Duane and with consent of Mr. Henes, it is ordered that this case be continued to April 4, 1946, to plead.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 13th day of January, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

DEFENDANT'S PLEA OF NOT GUILTY ENTERED

This case came on regularly this day for entry of plea of defendant, Vincent Bruno, who was present in proper person and with his attorney, Walter Duane, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon

the defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the attorneys, it is ordered that this case be continued to April 1, 1946, for trial. (Jury.)

In the Southern Division of the United States District Court for the Northern District of California, First Division

No. 30078-G

THE UNITED STATES OF AMERICA

vs.

VINCENT BRUNO.

VERDICT

We, the Jury, find Vincent Bruno, the defendant at the bar, guilty as to Count One of the Indicement. Guilty as to Count Two of the Indictment.

FRED S. FIELD,
Foreman.

[Endorsed]: Filed April 8, 1947.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Now comes Vincent Bruno, the defendant in the above entitled action, against whom a verdict of

guilty was rendered on the 8th day of April, 1947, in the above entitled cause, and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him.

1. That the indictment and each Count thereof does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That the evidence is not sufficient to support the verdict;

3. That the verdict of the jury is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court, and the defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated April 8th, 1947.

WALTER H. DUANE,
Attorney for Defendant.

[Endorsed]: Filed April 8, 1947.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the defendant Vincent Bruno, in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, for the following, and each of the following, causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant.

This motion is made upon the minutes of the Court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated April 8th, 1947.

WALTER H. DUANE,
Attorney for Defendant.

[Endorsed]: Filed April 8, 1947.

District Court of the United States for the
Northern District of California
Southern Division

No. 30078 G

UNITED STATES OF AMERICA,

vs.

VINCENT BRUNO.

JUDGMENT AND COMMITMENT.

On the 8th day of April, 1947, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Title 26 USC., 2553 & 2557; Harrison Narcotic Act, (Ct. 1) defendant did on or about August 20, 1945, in San Francisco, Calif., unlawfully sell, dispense and distribute heroin; Violation of Title 21 USC., 174; Jones-Miller Act, (Ct. 2) defendant did, on or about August 20, 1945, in San Francisco, Calif., knowingly conceal heroin which had been imported in the United States, contrary to law, as charged in Counts 1 & 2 of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years on Count One of the Indictment, and Ten (10) Years on Count Two of the Indictment and pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) on Count Two of the Indictment;

It Is Further Ordered that the sentence of imprisonment imposed on said defendant on Count Two of the Indictment commence and run at the expiration of the sentence of imprisonment imposed on said defendant on Count One of the Indictment,

It Is Further the recommendation of this Court that said defendant be given any hospitalization that he may require in a Federal Narcotic Hospital during his term of imprisonment,

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LOUIS E. GOODMAN,
United States District Judge.

L. R. ELKINGTON,
Deputy Clerk.

Examined by:

JAMES T. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to: Federal Penitentiary.

Entered in Vol. 38 Judg. and Decrees at Page 65.

Filed and entered this 8th day of April, 1947,

C. W. CALBREATH,
Clerk.

District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 8th day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 30078

UNITED STATES OF AMERICA,
vs.
VINCENT BRUNO.

MOTION FOR A NEW TRIAL AND MOTION IN ARREST OF JUDGMENT DENIED—MINUTES OF TRIAL AND SENTENCE

This case came on regularly this day for the trial of the defendant, Vincent Bruno, who was present

with his attorney, Walter Duane, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Thereupon the following named persons, viz:

Samuel L. Barnes	Neva M. Moore
John F. Sliwinski	Mrs. Elena Schreiner
Fred S. Field	Mrs. Gladys G. Nielsen
Robert Lee	Errol Lane
Frederique F. Breen	Mrs. Annella M. Lemmon
Miss Jessie I. Case	Mrs. Grace E. Marr

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made an opening statement to the Court and jury on behalf of the United States. R. F. Love, William H. Grady and Jacob Lieberman were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibits Nos. 1 and 2. The United States then rested. Vincent P. Bruno was sworn and testified in his own behalf, and thereupon the defendant rested. After argument by the attorneys and the instructions of the Court to the jury, the jury retired at 3:55 p.m. to deliberate upon its verdict. At 4:54 p.m. the jury returned into Court and upon being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered filed and recorded, viz:

> "We, the jury, find Vincent Bruno, the defendant at the bar, Guilty as to Count One of

the Indictment, Guilty as to Count Two of the Indictment.

FRED S. FIELD,
Foreman".

Upon being asked if said verdict as recorded was the verdict of the jury, each juror replied that it was. Ordered that the jurors be excused from further consideration of this case and from attendance upon the Court until notified.

Mr. Duane made a motion for a new trial and motion in arrest of judgment, which motions were ordered denied.

William F. Grady was recalled and testified on behalf of the United States.

The defendant was called for judgment. After hearing the defendant and the attorneys, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant Vincent Bruno, for the offense of which he stands convicted on his plea of Not Guilty and a verdict of the jury of guilty of the offense charged in the First and Second Counts of the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years on Count One of the Indictment; and Ten (10) Years on Count Two of the

Indictment; and pay a fine to the United States of America in the sum of Five Thousand ($5,000.00) Dollars on Count Two of Indictment.

It Is Further Ordered that the sentence of imprisonment imposed on said defendant on Count Two of the Indictment commence and run at the expiration of the sentence of imprisonment imposed on said defendant on Count One of the Indictment.

It Is Further the recommendation of this Court that said defendant be given any hospitalization that he may require in a Federal Narcotic Hospital during his term of imprisonment.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to a Federal Penitentiary.

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Name and Address of Appellant: Vincent Bruno, 437 Washington Street, Monterey, California.

Name and Address of Appellant's Attorney: Walter H. Duane, 790 Mills Building, 220 Montgomery Street, San Francisco, 4, California.

Offense: Violation of Harrison Narcotic Act, 26

U.S.C. 2553 and 2557 in the First Count of the Indictment; violation of Jones-Miller Act, 21 U.S.C. 174 in the Second Count of the Indictment.

After trial by jury a verdict was returned finding the defendant guilty on both counts of said indictment on the 9th day of April, 1947.

That thereupon, on the said 9th day of April, 1947, defendant made a motion for a new trial, which motion was denied, and thereupon made a motion in arrest of judgment which motion was denied, and the Court thereupon made its judgment and sentenced the defendant as follows:

Five years on the First Count,
Ten years on the Second Count,
Fined $5.000.00 on the Second Count.

The sentences in the First Count and Second Count to be served consecutively; the total sentence being fifteen years imprisonment and a fine of $5,000.00.

Name of Prison where now confined: County Jail of the City and County of San Francisco.

That defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

Dated: April 10th, 1947.

WALTER H. DUANE,
Attorney for Defendant.

[Endorsed]: Filed Apr. 11, 1947.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 16 pages, numbered from 1 to 16, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of United States of America, Plaintiff, vs. Vincent Bruno, Defendant, No. 30078 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of May, A.D. 1947.

[Seal] C. W. CALBREATH,
Clerk.
/s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11589. United States Circuit Court of Appeals for the Ninth Circuit. Vincent Bruno, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 22, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth Circuit

No. 11589

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL

Now comes Vincent Bruno, the appellant in the above entitled cause, and submits herein his statement of points upon which he intends to rely on appeal, as follows:

1. That the evidence was and is insufficient to support the verdict of guilty.

2. That the evidence was and is insufficient to support the verdict of guilty to the Second Count of said Indictment.

3. That the Court erred in overruling appellant's objections to questions propounded by the United States Attorney to the Government witnesses.

4. That appellant was twice put in jeopardy for the same offense.

5. That appellant was punished twice, though the same evidence was used to support conviction under both counts.

Appellant desires that the record, as certified to the Clerk of this Court, be printed in its entirety.

Dated: May 27th, 1947.

/s/ WALTER H. DUANE,
Attorney for Appellant.

Receipt of a copy of the foregoing Statement of Points Upon Which Appellant Relies on Appeal is hereby admitted this 28th day of May, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

By .....
Assistant U.S. Attorney.

No. 11589

United States
Circuit Court of Appeals
For the Ninth Circuit.

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 6-26-47—60

No. 11589

United States
Circuit Court of Appeals
For the Ninth Circuit.

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

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In the District Court of the United States for the Northern District of California, Southern Division

Before: Hon. Louis E. Goodman,
Judge.

No. 30,078

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VINCENT BRUNO,
Defendant.

REPORTER'S TRANSCRIPT

Tuesday, April 8, 1947

Counsel Appearing:

For the Government: James B. Davis, Esq., Assistant United States Attorney.

For the Defendant: Walter Duane, Esq.

(A jury was duly impaneled and sworn to try the cause, after which the following proceedings took place:) [1*]

Mr. Duane: If the Court please, may I at this time move that all witnesses be excluded from the courtroom?

The Court: Do you wish to have Mr. Grady remain? Is he to be a witness?

Mr. Davis: I have only two witnesses. My other witness may be excused.

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* Page numbering appearing at top of page of original certified Transcript.

The Court: All witnesses for both the Government and the defense in this case except Mr. Grady——

Mr. Davis: And you will stipulate that Dr. Love may remain?

Mr. Duane: Yes.

The Court: That will only apply to your own witnesses.

Mr. Duane: What is that?

The Court: I say any order that the Court may make——

Mr. Davis: I have another witness, your Honor, Mr. Liberman, who may be excused.

The Court: All witnesses in this case Mr. Grady and Dr. Love may be excused and will remain outside the courtroom until called.

Mr. Davis: Your Honor and ladies and gentlemen of the jury, as his Honor has told you, by reading the indictment, this is a narcotic case. It arises out of one transaction, that is, the sale of a certain quantity of narcotics, which was a violation of the Harrison Narcotic Act. As his Honor read to you, the indictment charges that the defendant did sell, dispense, and distribute not in or from an original stamped package a certain [2] quantity of narcotics. In passing I might say under Federal regulations all legitimate narcotics, narcotics manufactured for medicinal purposes, are marked with a revenue stamp similar to a package of cigarettes, and his Honor will no doubt instruct you, because it is the law, that the absence of those stamps is an indication that the narcotics are, of course, illicit drugs.

Then, in connection with that sale, it is quite obvious in most cases that the defendant would also possess the narcotics which he sold, and that gives rise to a second count, a violation of the Jones-Miller Act, which charges in substance that the defendant concealed and facilitated the concealment of the same narcotics which he was charged with in the first count having sold.

In this connection, ladies and gentlemen, the Government will prove that on August 20, 1945, at about 10:15 in the evening Agent Grady and a man by the name of Lieberman, a special employee of the Narcotic Division, drove in a government-owned automobile to the corner of Bush and Larkin Streets, and at that point Agent Grady searched Mr. Lieberman, the special employee, and found that he had no narcotics or money on his person. He gave him $100 from the official advance funds of the Federal Bureau of Narcotics. He then followed Mr. Lieberman, kept him under his observation, and saw him enter the Stardust Bar, which, I believe, as the evidence will show, is on Sutter [3] Street. He observed him enter there about 10:35 in the evening, that is, Mr. Lieberman entered the bar.

The defendant, Vincent Bruno, said, "Hello, Jack."

And Bruno, the defendant, and Lieberman walked into the washroom of the bar in the back where the defendant handed Lieberman a bindle of Heroin, the same bindle that is described in the indictment; that they had a conversation there, and Lieberman

said he thought he was to get two bindles. Bruno said, "No, I thought you only wanted one."

Lieberman gave Bruno $50 from the $100 which had already been given him by Agent Grady, and then he and Bruno came out of the washroom, and at 10:40 they came out of the bar and stood on the street. They talked there for a few moments. The defendant Bruno re-entered the bar. Lieberman walked down towards Larkin Street, where he was followed by Agent Grady, and he gave Agent Grady the bindle of heroin which he had purchased from the defendant Bruno, and gave him back $50 of the $100 which Agent Grady had given him. Having proven those facts, ladies and gentlemen, we will ask you to return a verdict of guilty as charged.

The Court: Did you want to put on a witness out of order in this matter or were you going to proceed in the regular order?

Mr. Davis: I thought we would put on Dr. Love, the chemist, if that is agreeable to Mr. Duane.

Mr. Duane: Oh, yes. [4]

DR. R. F. LOVE

was called as a witness on behalf of the Government; sworn.

The Clerk: Will you state your name to the Court and Jury?

A. R. F. Love.

(Testimony of Dr. R. F. Love.)

Direct Examination

By Mr. Davis:

Q. Dr. Love, what is your occupation?

A. Chemist, United States Internal Revenue Bureau.

Q. How long have you been engaged in that occupation? A. Twenty-eight years.

Q. As part of your official duties, is it necessary upon occasion for you to examine certain articles furnished to you for the purpose of determining whether or not they contain narcotics?

A. Yes, sir.

Q. And you perform certain specified tests on the material submitted to you, is that correct?

A. Yes, sir.

Mr. Davis: I ask that this white paper package be marked Government's No. 1 for Identification. I will ask that this envelope in which it is enclosed be marked Government's 2 for Identification.

(Thereupon white paper package was marked Government's Exhibit No. 1 for Identification and envelope in which package is enclosed was marked Government's Exhibit No. 2 for Identification.) [5]

Q. (By Mr. Davis): Dr. Love, I show you this white paper package marked Government's 1 for Identification and ask you if you ever saw that before? A. I did.

Q. When did you first see it?

A. On August 22, 1945.

(Testimony of Dr. R. F. Love.)

Q. From whom did you receive it, if you recall?

A. I received it from Narcotic Agent Grady.

Q. In accordance with your usual practice did you perform the tests that you testified to on the contents of that package? A. I did.

Q. What did you find it to contain?

A. It contained Heroin hydrochloride.

Q. Did you perform any quantitative tests?

A. No, sir.

Q. Directing your attention to some markings that are on that package, did you or did you not place your initials on the package at that time that you received it from Agent Grady and performed the tests?

A. Yes, sir, my initials and the serial number.

Q. It is a fact, is it not, that this package has been continuously in the possession of your office since the time you received it from Agent Grady until you produced it at the trial here today?

A. That is true, yes. [6]

Q. I show you this official envelope of the Treasury Department marked "District 14 Cal. 3434," and ask you if that is the envelope in which that bindle of narcotics was contained at the time you received it? A. It is.

Q. And it has been in that envelope until you opened it in court here today? A. Yes, sir.

Mr. Davis: That is all.

Mr. Duane: No questions.

The Court: That is all.

Mr. Davis: Dr. Love may be excused, I presume?

Mr. Duane: Yes.

The Court: Yes, Dr. Love may be excused. At this time, ladies and gentlemen, we will take a brief recess. We usually take a recess in midmorning and midafternoon for five or ten minutes. We will take the recess at this time. At all times while you are absent from the courtroom in recess or while you are going to your homes and businesses and while you are not present in the courtroom, it is your duty not to talk about this case among yourselves or allow anybody to talk to you about the case. Also it is your duty not to form or express any opinion concerning the case until the matter is finally submitted to you for your decision. We will take a recess at this time. [7]

(Recess.)

The Court: The Jurors are all present. You may proceed.

Mr. Davis: Call Mr. Grady.

WILLIAM H. GRADY

was called as a witness on behalf of the Government; sworn.

The Clerk: State your name to the Court and Jury.

A. William H. Grady.

Direct Examination

By Mr. Davis:

Q. Mr. Grady, what is your occupation?

(Testimony of William H. Grady.)

A. I am an agent of the Federal Bureau of Narcotics.

Q. How long have you been engaged in that occupation?

A. Approximately four and a half years.

Q. Do you know the defendant in this case, Mr. Vincent Bruno? A. Yes, sir.

Q. How long have you known Mr. Bruno?

A. I have known Mr. Bruno since—by sight to see him since 1944.

Q. Directing your particular attention to the 20th day of August, 1945, did you have occasion to see the defendant on that day? A. Yes, sir.

Q. Where did you first see him on that day?

A. At the Stardust Bar.

Q. Where is that located? [8]

A. That is located on the corner of Larkin and Sutter Streets, in San Francisco.

Q. At what time of the day or night did you first see him? A. Approximately 10:30 p.m.

Q. Was there anyone else with you at the time you saw the defendant?

A. I saw the defendant with Mr. Lieberman.

Q. Who is Mr. Lieberman?

A. He is a special employee of the Government.

Q. Does he work for the Federal Bureau of Narcotics with you? A. Yes, sir.

Q. Prior to your seeing Mr. Lieberman and Mr. Bruno together on the evening of August 20, 1945, what events transpired between you and Mr. Lieberman prior to that time?

(Testimony of William H. Grady.)

Mr. Duane: Objected to as incompetent, irrelevant, immaterial, and hearsay.

The Court: You are not asking for a conversation?

Mr. Davis: I am not asking for a conversation. I am just asking what transpired, if anything.

Mr. Duane: I urge the objection.

The Court: I will overrule it.

The Witness: As the result of a previous conversation with an informer I went with Mr. Lieberman in a Government automobile to the corner of Bush and Larkin Streets. At that point I searched Mr. Lieberman, went through his pockets and found that [9] he had no money or no narcotics. At that time I gave him $100, two $50 bills Government money. Government advanced funds. Then I walked——

Q. (By Mr. Davis): Before you go there, tell us how thorough was this search. You say you satisfied yourself that he did not have any narcotics or any money in his possession before you gave him the marked money, is that correct?

A. Yes. This search was a search of his clothing. He did not remove any of his clothing, his shoes or anything like that. The search was made over his person, his pockets, the ordinary places a person would be searched.

Q. What was the next thing, if anything, that you did?

A. I then followed Mr. Lieberman down to the Stardust Bar, which is a block from where the car

(Testimony of William H. Grady.)

was parked, walking down Larkin Street to the south, to the corner of Sutter and Larkin, and at that point I saw Lieberman enter the Stardust Bar.

Q. While you were walking down Larkin Street did you or did you not have Mr. Lieberman under your observation at all times? A. Yes, sir.

Q. Did you see him meet anyone else?

A. No, sir.

Q. About how far away were you from him as he was walking down the street?

A. Some places as close as five feet; other times perhaps as far away as twenty feet. [10]

Q. And it was approximately one block from where the car was parked down to the entrance of the Stardust Bar, is that correct? A. Yes.

Q. You say you saw Mr. Lieberman enter the Stardust Bar? A. Yes.

Q. How far away from him were you at the time he entered?

A. As he entered the bar I was standing on the curb at the outside edge of the sidewalk in front of the bar. The door was open to the bar. As he walked into the bar, I stood there and watched him meet the defendant, Bruno.

Q. Describe the situation there as far as the physical setup of the bar and the location of Mr. Bruno and Lieberman at the time they met.

A. The Stardust Bar—there is two entrances. The entrance that was used by Lieberman was the farthest one to the west, and there is a bar that runs along the side east of the door, just east of the door,

(Testimony of William H. Grady.)

and as you look through the door you can see to the rear of the bar a distance of approximately thirty-five feet. The stools are along in front of the bar, which, as I would look in, were on my right.

To the left as you look in, there is, as I recall, some booths there. I am not certain, but I believe there was. I wasn't too interested in that.

As Mr. Lieberman walked into the bar I saw the defendant, Bruno, standing about—he was about midway of the bar from [11] the front to the back and about the middle—about the middle of the bar. There were either five or six other people at the bar at the time, and I believe that Bruno was talking to some of the other people as Lieberman entered. As Lieberman approached, Bruno turned and said something, which I did not hear, to Mr. Lieberman, and together they walked to the back of the bar and through a door out of my view.

I then walked up the street, walking east on Sutter Street, to a point approximately seventy-five or a hundred feet from the corner, from the corner of Larkin and Sutter on the same side of the street as the Stardust Bar.

About five minutes later, three to five minutes later, I observed the defendant Bruno and Mr. Lieberman walk out of the front of the bar. Bruno looked up and down the street for a moment and talked or stood with Lieberman for approximately a moment. And then Bruno turned and walked back into the bar. Lieberman walked west on Sutter Street to Polk.

(Testimony of William H. Grady.)

I observed him all this time walk west on Sutter to Polk and turn on Polk to the right—that would be to the north. Approximately one hundred feet past the intersection of Sutter and Polk is an alley-way known as Fern Street. He stepped into this Fern Street and at that time handed me a bindle of Heroin and $50, one of the $50 bills that I had previously given him.

Q. At that time you observed him walk up the street, from the time he left Bruno out in front of the bar, until you met him [12] and he gave you the narcotics on Fern Street, did you see him meet anyone else? A. No, sir.

Q. Going back to the time you followed Mr. Lieberman into the bar, if I understand your testimony correctly, Bruno was about in the center of the bar? A. Yes.

Q. Lieberman walked up to him, they had a conversation, they turned and walked down to the end of the bar and out through a door?

A. Yes, sir.

Q. Where were you in relation to the bar and the premises at this time?

A. I was in front of the premises approximately on the curb, within a foot or two of the curb, standing on the sidewalk looking through the front door.

Q. And the door was open, you say?

A. The door was open.

Q. What was the condition of the barroom as far as lights are concerned?

(Testimony of William H. Grady.)

A. Rather subdued lighting, not a real brightly—not real brightly lit, but I would say a subdued lighting in the bar.

Q. After you saw Bruno and Lieberman go through this rear door what did you do next?

A. I then walked east on Sutter Street approximately one hundred [13] feet from the corner, seventy-five to one hundred feet from the corner, of the intersection of Sutter and Larkin.

Q. Then, if I understand your testimony correctly, you next saw Lieberman and Bruno come out in front of the bar and stand on the sidewalk?

A. Yes, sir.

Q. Bruno went back in and Lieberman then went on down the street? A. Yes, sir.

Q. About how much would you say elapsed from the time you saw Bruno and Lieberman go through the back door until they reappeared at the front of the premises?

A. From three to five minutes.

Q. I will show you Government's Exhibit No. 1 for Identification and ask you if this is the package which Mr. Lieberman—this is leaking, your Honor. I am going to be an addict myself.

Mr. Duane: We will object to it upon the ground it is incompetent, irrelevant, and immaterial, and not binding on the defendant.

Mr. Davis: You object to what, Mr. Duane?

Mr. Duane: The question you just propounded to the witness.

The Court: Overruled.

(Testimony of William H. Grady.)

Q. (By Mr. Davis): Is that the package which you received from Mr. Lieberman?

A. Yes, sir. [14]

Q. On the occasion that you just testified to?

A. Yes, sir.

Q. That is the package he gave to you at the intersection of Fern and Larkin, is it?

A. On Fern and Polk.

Q. What did you do with this after you received it.

A. I delivered that to the Internal Revenue Bureau of Chemists, Dr. R. F. Love.

Q. Is this the envelope in which it was contained (handing document to the witness)?

A. Yes, sir.

Q. And you say at that time that Mr. Lieberman, in addition to giving you that package, returned to you one of the $50 bills which you had previously given to him, is that correct? A. Yes, sir.

Mr. Davis: Will the Court bear with me a moment while I check this report?

That is all.

Cross-Examination

By Mr. Duane:

Q. Mr. Grady, this incident that you testified to you say occurred on the 20th of August, 1945, is that right? A. Yes, sir, that is correct.

Q. By the way, you referred here to Lieberman as a special employee. A. Yes, sir. [15]

(Testimony of William H. Grady.)

Q. As a matter of fact, he is what is termed an informer, is he not?

A. Well, you could call a man anything if you wished to call him names, I imagine, counsel.

Q. Not names, but what is the designation that your department gives him, and I will ask you does it not give the designation for this man as informer?

A. I have seen him referred to as both an informer and a special employee.

Q. You know he is an ex-convict?

A. Why, of course, yes.

Q. And you know that he is not a civil service employee? A. No, sir.

Mr. Davis: If the Court please, I am going to object to all of this. We are going to produce Mr. Lieberman. These questions are all proper cross-examination of him if they are proper at all. They are not of Mr. Grady's knowledge.

Mr. Duane: I think it is proper cross-examination, if the Court please, when it refers to the man as a special employee.

The Court: I will allow it.

Q. (By Mr. Duane): You and Lieberman drove to Larkin and Bush Street, is that correct?

A. Yes, sir.

Q. Was there anyone else with you?

A. Yes, sir, Agent Joseph Bartis. [16]

Q. Lieberman left you and walked ahead of you south of Market Street, is that correct?

A. South of Market, that is right.

Q. Turned the corner at Sutter, turned to his left, turned east?

(Testimony of William H. Grady.)

A. Yes, turned east on Sutter.

Q. You were a short distance behind him, sometimes twenty feet and sometimes five feet?

A. I didn't say I was behind him, counsel.

Q. Oh, you were not behind him?

A. I didn't say I was behind him.

Q. Where were you then?

A. I was oftentimes even with him on the sidewalk. Sometimes I walked opposite him. Sometimes I walked behind him. I did not make any special pattern as we walked down.

Q. At any rate, he walked east on Sutter Street to the entrance of this tavern, didn't he?

A. He walked on Sutter east, that is right, to the entrance to the bar.

Q. To the entrance to the tavern?

A. Yes, sir.

Q. You also walked east on Sutter?

A. Yes, sir.

Q. To the entrance to the tavern or out toward it, out on the sidewalk, is that right?

A. That is right. [17]

Q. Where you could look in?

A. That is right.

Q. And you saw Lieberman go in. By the way, he is also known as Mendel, isn't he, Jack Mendel?

A. Yes.

Q. So you saw him enter the premises; at that time you saw Bruno also? A. Yes, sir.

Q. Can you tell us how Bruno dressed? Was he tending bar?

(Testimony of William H. Grady.)

A. No, sir, he was on the outside, on the customers' side of the bar.

Q. On the customers' side of the bar?

A. Yes.

Q. And——

A. Pardon me. You asked me how he was dressed.

Q. Yes. I meant to say he did not have a bartender's uniform on? A. No, sir.

Q. Then you saw the defendant and Lieberman meet? A. Yes, sir.

Q. Saw them come together. Did you see them walk down towards the back of the bar and through a doorway, is that right? A. Yes, sir.

Q. Did you see them go through that doorway?

A. Yes, sir. [18]

Q. Did the door close after them?

A. I don't know. They passed from my view.

Q. What?

A. They passed from my view. The only place they could have gone was through the door.

Q. When you saw that happen, as I understand your testimony, you walked east on Sutter Street?

A. Yes, sir.

Q. Up the hill? A. Up the hill.

Q. You went up to about one hundred feet, I think you said, west of the street above that?

A. No, one hundred feet east of the corner that the bar is on.

Q. You walked about one hundred feet from

(Testimony of William H. Grady.)

Sutter Street. That would be on Sutter between Market and Hyde?

A. That would be on Sutter between Market and Hyde.

Q. About one hundred feet up?

A. About one hundred feet up the hill from the intersection of Sutter and Larkin.

Q. Then you saw Lieberman and the defendant both come out from the premises there, from the bar? A. I did.

Q. And they stood on the sidewalk?

A. Yes, sir.

Q. For how long? [19]

A. I would say, to the best of my recollection, it could have been a minute and a half, but I would say a minute. It wasn't very long.

Q. What were you doing at that time?

A. I was standing on the street.

Q. Just watching? A. Yes, sir.

Q. As I recall your testimony, Bruno reentered the bar? A. Yes, sir.

Q. And Lieberman walked west on Sutter Street? A. Yes, sir.

Q. And he walked to Polk?

A. Walked to Polk, yes, sir.

Q. He turned to the right on Polk Street, walking north on Polk? A. That is right.

Q. Then he came to this little street called Fern Avenue or Fern Street? A. Yes, sir.

Q. And he turned to the right and went into that little street, is that right?

(Testimony of William H. Grady.)

A. That is right, yes, sir.

Q. Did you walk with him along Sutter Street?

A. No, sir.

Q. You contacted him in Fern Street? [20]

A. Well, walked close enough to him to where I could have touched him after we turned on Polk Street.

Q. Did you run to catch up to him?

A. No, I walked fast. I walked fast and he didn't walk too fast.

Q. However, he got into Fern Street and you followed him in there?

A. I went in with him, you might say.

Q. You went in with him; you went together?

A. That is correct.

Q. Why did you go into Fern Street if you were together?

A. I wanted to look him over. I wanted to see how much money he had. He was going to give me the money he had if he had any money.

Q. You knew he had some money?

A. No, I gave him $100, and I was either going to get the narcotics or the money at that time.

Q. You say you wanted to see what money he had and you wanted to get the money? A. Yes.

Q. Wasn't it your thought that the money had been disposed of?

A. Yes, it had been up to the time he turned the corner on Polk Street.

Q. What is that?

A. Up to the time he came down on Polk Street

(Testimony of William H. Grady.)

and, I think, as [21] I recall, to the best of my recollection, he had told me that he had $50; that he had only purchased one paper as he was walking on Polk Street.

Q. So you went into little Fern Street to get the $50?

A. I wanted to talk to Mr. Lieberman.

Q. You had an automobile waiting up at Larkin and Bush, didn't you?

A. That is right, where I told the man I would meet him. This was a pre-arranged meeting place.

Q. This was all pre-arranged?

A. Oh, yes, yes.

Q. So you did not make the meeting place in the automobile but, rather, made it on Fern Avenue near Polk, is that right? A. Yes, sir.

Q. By the way, about what time was that?

A. Oh, I would say that was 10:40.

Q. About 10:40 p.m.? A. Approximately.

Q. What was the lighting condition in Fern Avenue that night?

A. To the best of my recollection it was just an ordinary—it isn't a real dark street or not a real bright street. It is just one of these——

Q. Don't you know, Mr. Grady, there is no light in Fern Street or Fern Avenue between Polk and Larkin?

A. Is there any light on Polk Street, Mr. Duane?

Q. I am talking now about Fern Avenue.

A. You probably have the impression, Mr.

(Testimony of William H. Grady.)

Duane, that I met Mr. Lieberman in the middle of Fern Avenue.

Q. What is that?

A. Did I leave you with the impression that I met Mr. Lieberman in the middle of Fern Avenue, down half way between Polk and Larkin?

Q. No, I do not have any impression. I just want your testimony.

A. The testimony that I am giving you, counsel, is that it was approximately fifteen to twenty feet from Polk Street, the place the transaction was made, where Lieberman handed me the narcotics and the money.

Q. Is that all that transpired, he handed you the narcotics and the money?

A. Yes, and I looked through his pockets again.

Q. By the way, you say you searched him before he went into this tavern? A. Yes, sir.

Q. Where did that search take place?

A. In the automobile.

Q. In the automobile? A. Yes.

Q. What kind of a search did you make? How did you search him?

A. I reached through his pockets, felt into his pockets, much the same as you would feel into a pocket—you would go through [23] his clothing. That was the extent of my search.

Q. What pockets did you go through?

A. All the pockets that I could find.

Q. What?

A. All the pockets that I could find.

(Testimony of William H. Grady.)

Q. Was he wearing a vest? A. No, sir.

Q. He was not? A. No, sir.

Q. Can you tell the Jury what pockets you searched? A. Yes, sir.

Q. Will you tell them?

A. Yes, sir. He had on a sports jacket with two pockets on the side; no other pockets in the sports jacket as I recall. He had on a sport shirt with two pockets in the shirt. He had on trousers with two side pockets, two rear pockets, and a watch pocket. That is the pockets that I searched.

Q. Those were the pockets that you searched?

A. Yes, sir, to the best of my recollection.

Q. By the way, Mr. Grady, did I understand you to say that you gave Lieberman two $50 bills?

A. Yes, sir.

Q. And they were marked, were they?

A. Well, you might call them marked, Mr. Duane. We call them identified. When we take official advance funds out of the [24] Government funds, traveling around with different criminal elements, we identify the money so that if we are robbed we would be able to recover our money if it was possible.

Q. Is that identification the number of the bill?

A. The serial number.

Q. The serial number? A. Yes, sir.

Mr. Duane: That is all.

Mr. Davis: That is all.

The Court: Is this bar at the corner?

A. At the corner, yes, sir.

(Testimony of William H. Grady.)

The Court: I do not think that that was clear.

Q. The bar itself was on the corner of Larkin and Sutter?

A. Larkin and Sutter, the entrance being about ten feet from the Larkin—on Sutter Street about ten feet from the corner of Larkin, from the intersection.

Redirect Examination

By Mr. Davis:

Q. Mr. Grady, you say it was pre-arranged with Lieberman as to where you were going to meet him after he came out of the bar, is that correct?

A. Yes, sir.

Q. That was up this alley?

A. Up Fern Street, yes, sir.

Q. You say you were fifteen or twenty feet around the corner from Polk Street? [25]

A. Approximately that. That is my estimation of it.

Q. It was there that he handed you the narcotics and gave you back the money? A. Yes, sir.

Q. To the best of your recollection you believe he told you he bought only one paper instead of two?

A. Yes.

Q. When he was walking up the street with you on Polk, is that correct?

A. Yes, that is my recollection of the transaction.

Q. Then what did you do, go back to your car?

Mr. Duane: Just a minute, if the Court please,

(Testimony of William H. Grady.)

we will object to that as not proper redirect examination.

Mr. Davis: I think it is proper, your Honor, because the defense counsel has gone into the point about why they did not go up to the car and why they went into Fern Street.

Mr. Duane: I will withdraw the objection.

Q. (By Mr. Davis): What did you do after that?

A. We went back to the automobile. I walked down through Fern Street to Larkin, up Larkin to Bush, and entered the Government automobile and left. The reason we didn't——

Mr. Duane: Just a minute.

The Court: You have answered the question.

Mr. Davis: That is all.

Mr. Duane: That is all. [26]

Mr. Davis: Call Mr. Lieberman.

JACOB LIEBERMAN

was called as a witness on behalf of the Government; sworn.

The Clerk: State your name to the Court and Jury.

A. Jacob Lieberman.

Direct Examination

By Mr. Davis:

Q. Mr. Lieberman, where do you reside?

A. 361 South Third Street, Brooklyn, New York.

(Testimony of Jacob Lieberman.)

Q. What is your occupation?

A. Wardrobe maker.

Q. What type of occupation is that? I do not understand it. A. Luggage.

Q. Luggage? A. Yes, sir.

Q. Were you also employed by the Federal Bureau of Narcotics? A. Yes, sir.

Q. What is your occupation for them?

A. Special employee.

Q. You have a civil service standing?

A. No, sir.

Q. How are you employed? Full or part time?

A. By the day.

Q. Would I be correct in assuming, then, that you work on various cases for the Government as you are assigned to them, [27] is that correct?

A. Yes. sir.

Q. In the light of your testimony that you are employed by the Federal Bureau of Narcotics as a special employee in various cases, are you known by any other name than Jacob Lieberman?

A. Yes, sir.

Q. What other names, if you can recall them?

A. Well, Jack Louis, Jack Cohen, Jack Hayward—and various other different names, but I always used my first name.

Q. You always used Jack? A. Jack.

Q. In San Francisco in connection with this case we are considering here today against Vincent Bruno, what name were you known by?

A. Jack Mendel.

(Testimony of Jacob Lieberman.)

Q. But your true name is Jacob Lieberman?

A. Lieberman.

Q. Do you know the defendant in this case, Vincent Bruno? A. Yes, sir.

Q. Do you see him seated in the courtroom here today? A. Yes, sir.

Mr. Davis: It is stipulated, I presume, the witness has identified the defendant?

Mr. Duane: Yes.

Q. (By Mr. Davis): When did you first meet Mr. Bruno when you [28] came to San Francisco?

A. About the first week in August.

Q. Of what year? A. 1945.

Q. Directing your particular attention to the 20th day of August, 1945, did you have occasion to meet the defendant on that day? A. Yes, sir.

Q. Where did you meet him?

A. I met him at the Stardust Bar at 10:30 in the evening. I met him inside the bar.

Q. Was there anyone else with you at the time you met him? A. At that very moment?

Q. Yes.

A. I was with Agent Grady at that time.

Q. Tell us now the circumstances under which you met Bruno in relation to the bar?

A. Yes, sir. I was with Agent Grady and Agent Bartis. I was in the Government car at Bush and Market Streets. Agent Grady gave me $100 and searched me before he gave me the money, and I left the car over there and I walked down Larkin Street into Sutter Street. At that point I went into

(Testimony of Jacob Lieberman.)

the Stardust Inn and I met Vince Bruno there. We greet each other.

Q. Tell me this: When you went to the Stardust Bar where was Bruno in relation to the premises when you first saw him as you [29] entered?

A. He was outside the bar, right at the center of the premises inside the bar.

Q. When you say he was outside the bar, you mean he was on the customers' side of the bar?

A. On the customers' side of the bar.

Q. And about in the center of the room that contains the bar, is that correct? A. Yes, sir.

Q. Did you have any conversation with him at that point? A. Yes, sir.

Q. Who, if anyone else, was present, if you know, at that conversation?

A. Well, I and he alone. We were the only ones present at that particular time. There were other people at the bar there, but I paid no attention to other people at the bar. When I met him, Bruno told me that he was expecting me. He told me to follow him, and I followed him. We went to the rear of the bar and we turned right and we opened up the door. We went into a men's washroom over there. He went ahead and gave me a bindle of Heroin. I told him I wanted two. He said, "No, I thought you said, according to the telephone conversation, I thought it was only one."

So then he told me, "If you want to wait about a half an hour I will give you the two of them." [30]

I said, "No, I have to go back to my hotel."

(Testimony of Jacob Lieberman.)

I asked him what he gets for the bindles. He said $50. I had two $50 bills in my possession which I received from Agent Grady. I gave him the $50 and I told him I would see him later at the hotel. But we then walked out together, right out the entrance to the bar, right into the street. I looked up and down. I told him, "I am going to look around for a cab to go back to the hotel."

We stood there for a minute or so. I then walked to Polk Street, on Sutter, and then I turned into Polk, walked up north into Fern Street—there is a little alleyway where I met Agents Grady and Bartis. I then gave Agent Grady the package and returned him the $50, and I told him, "He only gave me one bindle."

I then marked the package with my initials on it.

Q. I show you Government's Exhibit No. 1 for Identification and I ask you if this is the bindle which the defendant sold to you for $50 and which you turned over to Agent Grady? A. Yes, sir.

Q. Did you place your initials on there at that time?

A. Yes, sir, I recognize my initials on there.

Q. You see them on there now?

A. Yes, sir.

Q. Tell me, Mr. Lieberman, have you ever been convicted of a felony? [31]

A. Yes, sir, in 1931.

Q. What was that for? A. Narcotics.

Q. Was it in a Federal or State court?

A. Federal court.

(Testimony of Jacob Lieberman.)

Q. Was it for sale or possession?

A. Sale of narcotics.

Mr. Davis: I believe that is all.

Cross-Examination

By Mr. Duane:

Q. You say that conviction was in 1931?

A. Yes, sir.

Q. For the sale of narcotics? A. Yes, sir.

Q. You have not been convicted since that time for the sale of narcotics? A. Yes, sir.

Q. You have. You say you are a special employee of the Narcotics Bureau? A. Yes, sir.

Q. What does this employment as a special employee consist of?

A. Buying narcotics for the narcotic people in various different cities.

Q. How are you paid? A. By the day.

Q. What? [32] A. By the day.

Q. By the day? A. Yes, sir.

Q. Aren't you paid by the case?

A. Well, it could be by the case also.

Q. It could be? A. Yes.

Q. Isn't it a fact that when you turn a man in, as it were, you get paid for it? A. Yes, sir.

Q. You lived at the Uptown Hotel in San Francisco in August, 1945, didn't you?

A. Yes, sir.

Q. And you had a sort of roommate, if you call it such, by the name of Jimmie Berry, is that correct?

(Testimony of Jacob Lieberman.)

Mr. Davis: I object to this, your Honor, as not being proper cross-examination.

Mr. Duane: It is preliminary, if the Court please.

The Court: The word "preliminary" covers a wide range. It has to have some connection.

Mr. Duane: I can assure you that it does. It will be apparent in my next question after this.

The Court: Let him answer that question.

Q. (By Mr. Duane): Is that so?

A. Yes, sir, he had a room next to mine. [33]

Q. With a door open between the two rooms, is that right? A. Opened and closed, yes, sir.

Q. And the defendant, Vincent Bruno, lived in the same hotel, didn't he? A. Yes, sir.

Q. At that time? A. Yes, sir, Room 219.

Q. You used to see him rather frequently?

A. Yes, sir.

Q. You also frequented the bar operated by Bruno's brother, the Stardust, didn't you?

A. Yes, sir.

Q. You were there several times?

A. Yes, sir.

Q. And you were there several times before August 20th; that is right, isn't it?

A. Yes, sir.

Q. Getting down to August 20th, now, as I understand your testimony, you rode to Bush and Market Streets in the automobile with Mr. Grady and with Mr. Bartis, right? A. Yes, sir.

Q. And you left the automobile and you went to the Stardust? A. Yes, sir.

(Testimony of Jacob Lieberman.)

Q. And you went by yourself, is that correct?

A. Yes, sir. [34]

Q. Walked along the street alone?

A. Yes, sir.

Q. And you went into the Stardust and you met the defendant Bruno? A. Yes, sir.

Q. And you walked back to the washroom?

A. Yes, sir.

Q. Or lavatory, or whatever it is there, the two of you together, is that right? A. Yes, sir.

Q. You had been in there before, hadn't you?

A. Yes, sir.

Q. In that lavatory? A. Yes, sir.

Q. In fact, you were in there the day before, weren't you?

A. I don't recall whether it was the day before.

Q. And you were in there the night of that day before?

A. That I don't remember, if I was there or not. I know it was quite a number of times before that.

Q. What is that?

A. I know I was there a few times before that, but when I do not recall that.

Q. You received from the defendant this bindle?

A. Yes, sir.

Q. And then what did you say to him? "How much is it?" [35] A. Yes, sir.

Q. You asked him how much it was?

A. Yes, sir.

Q. And he said $50? A. Yes, sir.

Q. And you gave him $50? A. Yes, sir.

(Testimony of Jacob Lieberman.)

Q. So before you went there you did not know how much it would be?

A. Oh, I knew it was $50.

Q. Then why did you ask him how much it was?

A. I think probably it was more or probably it was less.

Q. You said you knew what it would be.

A. Every day the prices are fluctuating. They go up and down.

Q. You did not know what the market was on that day, is that it?

A. I knew exactly what it was, but everybody has different prices.

Q. Well, didn't you have a price with Bruno?

A. I did not make up a price with him right then and there.

Q. Then, why did you take two $50 bills from Mr. Grady?

A. Well, I expected to buy two then.

Q. You did not know what you were going to pay for them?

A. Oh, yes, sir, I had an idea what I was going to pay for it.

Q. What was your idea? What were you going to pay?

A. Well, $50 a package or probably $52, $53, or $45.

Q. Yes, but you had no money on you other than this $100, did you? [36] A. No, sir.

Q. And you were going to get two bindles?

A. Yes, sir.

(Testimony of Jacob Lieberman.)

Q. So, notwithstanding that, you just asked him, "How much is it?" A. Yes, sir.

Q. You had no agreement beforehand?

A. No, sir. I knew for a fact that he was selling bindles at $50 a package.

Q. Oh, you knew that? A. Yes, sir.

Q. By the way, you sold some narcotics in San Francisco during August, 1945, didn't you?

A. No, sir.

Q. No? A. No, sir, positively no.

Q. Positively no? A. That is correct.

Q. You did not have any narcotics in that room in the Uptown Hotel, you and Jimmie Berry?

A. No, sir.

Q. No? A. No, sir.

Q. And you did not do any smoking up there?

A. Oh, yes, sir.

Q. Sure you did. [37] A. Yes, sir.

Q. You did?

A. I didn't do any smoking there, but Vincent Bruno did the smoking.

Q. Oh, Vince Bruno, but you did not smoke?

A. No, sir.

Q. You do not smoke? A. No, sir.

Mr. Duane: Shall I proceed?

The Court: We will take the noon recess now, if you wish.

Ladies and gentlemen, we will take the noon recess at this time and resume the trial of the case at two o'clock. I will ask you to return at that time, and bear in mind the admonition I gave you heretofore.

(Thereupon a recess was taken until 2:00 p.m. this date. [38]

Afternoon Session, Tuesday, April 8, 1947
2:00 P.M.

The Court: The Jurors are all present. You may proceed.

JACOB LIEBERMAN

recalled; previously sworn.

Cross-Examination (Resumed)

By Mr. Duane:

Q. When you emerged from the Stardust the defendant walked out with you, didn't he?

A. Yes, sir.

Q. Out to the street? A. Yes, sir.

Q. You stood there and talked to him?

A. I stood there for about a minute or so.

Q. Just about a minute? A. Yes.

Q. At that time did you see Mr. Grady?

A. Yes, sir; he was standing right near by.

Q. He was where?

A. He was standing right near by.

Q. How far from you?

A. I would say about ten or fifteen feet away.

Q. About ten or fifteen feet from you?

A. Yes.

Q. You and the defendant were immediately

(Testimony of Jacob Lieberman.)

opposite the entrance [39] to the bar, I take it, were you? A. Yes, sir.

Q. Grady was just about ten or fifteen feet from you? A. On the outside.

Q. Yes, on the outside, right where you were standing, about ten or fifteen feet from you?

A. It may have been twenty feet. I couldn't say exactly.

Q. It would not be fifty or one hundred?

A. No, sir.

Q. So then you walked along Sutter Street towards Polk? A. Yes, sir.

Q. Did Grady go with you?

A. He must have been on the—alongside of me, because when I reached the corner I saw him.

Q. When you reached what corner?

A. Polk Street.

Q. When you reached the corner of Sutter and Polk you saw Grady? A. Yes, sir.

Q. Where was he then?

A. Oh, about probably five feet away from me.

Q. Five feet behind you?

A. On the side of me.

Q. Alongside of you? A. Yes.

Q. You turned the corner, you turned to your right, and you went [40] north on Polk Street?

A. Yes, sir.

Q. And you went into Fern Avenue?

A. Yes, sir.

Q. Was Bartis in there when you came into Fern Avenue? A. Yes, sir.

(Testimony of Jacob Lieberman.)

Q. Bartis was right there? A. Yes.

Q. Grady came behind you, did he?

A. Yes, sir.

Q. Then the three of you stood together there and, as I understand it, you gave him $50 and a bindle, is that right? A. Yes, sir.

Q. Who did you hand it to?

A. Agent Grady.

Q. You did not give anything to Bartis at that time? A. No, sir.

Q. Then what did you do after you met Bartis and Grady there? Where did you go?

A. We went along that alleyway, Fern Street, into Larkin, and when we hit Larkin Street we went right up to Bush Street, where the Government car was stationed over there. I went into the car with him.

Q. What did you do after that?

A. They drove me to Fulton Street, Fulton and Fillmore. [41]

Q. To the Uptown Hotel?

A. Yes, sir. They dropped me off around the corner.

Q. Just around the corner from the Uptown Hotel? A. Yes, sir.

Q. You were stopping at the Uptown Hotel at that time? A. Yes, sir.

Q. Did you then go into the hotel?

A. Yes, sir.

Mr. Davis: I am going to object now, your Honor. I think we are getting too far afield to what transpired after the commission of this offense.

(Testimony of Jacob Lieberman.)

Mr. Duane: I will submit the objection.

Mr. Davis: It is not part of the res gestae.

Mr. Duane: I think it is part of the res gestae.

The Court: The witness said he went into the Uptown Hotel. Now, what is the next question?

Q. (By Mr. Duane): The next question is did you have a guard come in your room that night?

Mr. Davis: I object to that, your Honor.

The Court: Unless there is some connection with the matter, I would hold that that was remote now.

Q. (By Mr. Duane): When you returned and you met Grady and Bartis on Fern Avenue, were you searched? A. Yes, sir.

Q. You were searched in the alleyway there?

A. Yes, sir.

Q. Was that before or after you gave the bindle and the $50 to Grady?

A. I was searched at Polk—I was searched at Bush and Larkin Streets. When I got out of the Government car I was searched there.

Q. What kind of search did they give you there?

A. They just went over my pockets and through my shirt to see if I had anything hidden.

Q. That was before you went into the Stardust?

A. Yes, sir.

Q. After you left the Stardust and came back to Fern Avenue where you met Grady and Bartis, were you searched again? A. No, sir.

Q. They did not search you again?

A. No, sir.

(Testimony of Jacob Lieberman.)

Q. You simply gave them the $50 and the bindle, is that right? A. Yes, sir.

Q. Did you see Bruno the next day?

A. I think I did.

Q. What time of day?

Mr. Davis: I am going to make the same objection, your Honor. I do not see what possible connection it could have with this case as to whether he saw him the day after.

The Court: Unless it involved some conversation or something [43] that might be relevant—I do not see any harm in the witness being permitted to answer the question as to whether he saw the defendant on that day.

The Witness: I may have seen him the following day. I am not positive whether I seen him or not, but I know I have seen him quite a number of times after that, three or four times a week.

Q. (By Mr. Duane): You are not sure whether you saw him the next day and had a conversation with him? A. No, sir.

Mr. Duane: That is all.

Mr. Davis: We have no further questions.

The Court: That is all.

Mr. Davis: May I recall Mr. Grady for one or two questions?

WILLIAM H. GRADY

was recalled as a witness on behalf of the Government; previously sworn.

Q. (By Mr. Davis): Mr. Grady, I neglected to take this matter up with you on your direct examination: You have testified that an agent by the name of Bartis was with you upon this occasion, is that correct? A. Yes, sir.

Q. Is he still in your department?

A. Yes, sir. He is on sick leave at this time. [44]

Q. Did you make an effort to produce him here today?

Mr. Duane: That is objected to on the ground it is incompetent, irrelevant, and immaterial.

Mr. Davis: I am entitled to show, your Honor, why I have not produced him, since his name has appeared in the case.

Mr. Duane: I think there is a method of doing that, if your Honor please, and this is not the method.

Mr. Davis: What method?

The Court: I will overrule the objection on the ground stated.

The Witness: Yes, sir. I contacted his hotel yesterday. He lives in a hotel here in San Francisco. And they said he had gone back——

Mr. Duane: I can't hear the witness, if the Court please.

The Witness: Pardon me, Mr. Duane.

I called his hotel yesterday and they said he had returned——

(Testimony of William H. Grady.)

Mr. Duane: Just a minute. That is objected to on the ground it is hearsay.

The Court: That objection is good. I will sustain the objection.

Q. (By Mr. Davis): Did you locate Mr. Bartis at the hotel? A. No, sir.

Q. How long has it been since Mr. Bartis has been working in your department here in San Francisco?

A. Mr. Bartis has been on leave from our department since the [45] first of July of last year, 1946.

Mr. Davis: That is all.

Mr. Duane: No questions.

Mr. Davis: The Government rests.

The Court: What are you going to do about these exhibits which are marked for identification?

Mr. Davis: Pardon me. Will you take the stand again, Mr. Grady?

Q. If I recall your testimony, Government's Exhibit No. 1, the narcotic bindle, is the bindle which you received from Mr. Lieberman in Fern alley, is that correct?

The Court: I think he has already testified to that, Mr. Davis.

The Witness: Yes, that is the one.

Mr. Davis: At this time, your Honor, I will ask that Government's Exhibit No. 1 for Identification be received in evidence as Government's exhibit first in order.

Mr. Duane: To which we object on the ground

(Testimony of William H. Grady.)

it is incompetent, irrelevant, and immaterial, hearsay, and in no way binding on the defendant in this case.

The Court: The objection is overruled. It will be admitted.

Mr. Davis: I offer in evidence Government's Exhibit 2, which is the envelope in which that bindle was placed before it was delivered to the chemist.

Mr. Duane: We make the same objection to that, and we make it on the further ground that obviously the paper is in no way binding upon this defendant. It is something in the handwriting of some person.

The Court: Let me see it.

Mr. Davis: If the Court please, we only offer it for the purpose of establishing the chain of the custody of the narcotics from the time they were received by the agent until they were produced here in court by the Government chemist.

Mr. Duane: We will submit that that is all self-serving.

The Court: Aren't you offering the writing itself in evidence?

Mr. Davis: No, your Honor.

The Court: You are just offering it for the limited purpose of showing it was the container in which Exhibit 1 was kept until it was returned in court?

Mr. Davis: Yes, your Honor.

The Court: For that limited purpose it may be admitted.

(U. S. Exhibits Nos. 1 and 2 for Identification were thereupon received in evidence and were marked respectively Government's Exhibits Nos. 1 and 2.)

Mr. Davis: That is all. The Government rests.

VINCENT BRUNO

the defendant herein, was called as a witness on his own behalf; sworn.

The Clerk: State your name to the Court and Jury.

A. Vincent Bruno.

Direct Examination

By Mr. Duane:

Q. You are the defendant here. How old are you? A. Thirty-eight years old.

Q. During the month of August, 1945, were you employed at the Stardust Tavern?

A. Yes, I was.

Q. Who operates that establishment?

A. It is owned by my brother.

Q. Your brother Joseph Bruno?

A. That is right.

Q. On the night of the 20th of August, 1945, were you at the premises? A. Yes, sir.

Q. What were your duties?

A. Well, I was acting as manager while my brother was away.

(Testimony of Vincent Bruno.)

Q. You were not a bartender? A. No, sir.

Q. You were on the floor, is that so?

A. I was. [48]

Q. You know this witness here, Lieberman, do you?

A. Yes, I knew him very well. He lived in the same hotel I did.

Q. Did you know him under the name of Lieberman?

A. No, under the name of Jack Mendel.

Q. Jack Mendel? A. Yes, sir.

Q. Did you see him frequently in that hotel?

A. Every day.

Q. Were you ever in his room?

A. Oh, not exactly in his room; in the next room, in Berry's room. They had the door open between them. I used to go up there once in awhile.

Q. The door was open between the two rooms?

A. That is right.

Q. Did you ever see Lieberman or Mendel in the Stardust Bar?

A. Oh, yes, he came in many a time.

Q. Many a time? A. Many a time.

Q. Directing your attention to August 20th, 1945, at about the hour of 10:30 p.m., did you see him?

A. Well, being that he mentioned—I couldn't remember—being that he mentioned it, I knew he came in one night there, he was kind of in a hurry—he walked in the place and said, "Vincent, I want to talk to you." So we walked into the back.

Q. Into the back where? [49]

(Testimony of Vincent Bruno.)

A. In the washroom. It is the men's toilet. Everybody used to go in there. "I want to talk to you by yourself."

Q. Is that the lavatory that is used by the customers, the patrons? A. That is right.

Q. The door is unlocked?

A. It is always unlocked.

Q. You went in there with him?

A. We got back there and he says, "When you get through tonight, or if you can come now, we are going to have a game up in my room, my room and Jim's room. Why don't you come up and play with us?"

I said, "You will have to wait until I get through tonight. When I get through I will come up to the hotel and play with youse."

Q. Was there any further conversation than that between you?

A. No, not much. Just "What's doing? How's everything?" That is all. And if I remember, he used the lavatory while we were talking, and when he got through he stopped and said, "Just a minute." He bent down and tied his shoe, if I remember right.

Q. Then did you walk out with him?

A. Yes, sir.

Q. Out to the sidewalk? A. Yes. [50]

Q. Let me ask you, while you were in that lavatory or at any place in the Stardust did you hand him anything?

A. (The witness shook his head.)

(Testimony of Vincent Bruno.)

Q. Or did he hand you anything?

A. No, sir.

Q. Just say yes or no. A. No, sir.

Q. I show you here Government's Exhibit 1 and I will ask you if you handed that to Lieberman or Mendel?

A. I never seen that before in my life.

Q. Did he give you any money?

A. No, sir.

Q. Did he talk to you on that occasion about narcotics of any kind? A. No, sir.

Q. About how many people would you say were in the tavern, the bar there, at the time he came in there?

A. Jeez, I don't remember. As a rule about that time of the night is when we start getting real busy. As a rule, at that time we was always packed.

Q. You don't recall this particular night?

A. I don't recall this special night, no.

Mr. Duane: That is all.

Cross-Examination

By Mr. Davis:

Q. How long were you employed at the Stardust Bar? [51]

A. Oh, about a little over a year, about a month after my brother bought it.

Q. When was that?

A. If I remember right, I think we bought it about November or December, 1944.

(Testimony of Vincent Bruno.)

Q. And you think you were there about a year?

A. Yes, until the time I got arrested.

Q. The time you were arrested?

A. That is right.

Q. And that was about a year then?

A. If I remember right, I think it was in March or February, either one of those months when I was arrested.

Q. Now, when you were employed there, in what capacity were you employed?

A. Acting as manager.

Q. You used to sign checks and operate the bar, didn't you? A. That is right.

Q. Was your brother there too? Was he working bar?

A. No, he used to come in and out. My brother had other interests.

Q. You say Lieberman lived in the same hotel as you did? A. That is right.

Q. What hotel was that?

A. Uptown Hotel.

Q. You visited up in the room next to his on several occasions? [52]

A. I used to see him in the lobby at all times, almost every day and every night.

Q. You say he used to come in the Stardust Bar frequently, is that correct? A. Yes, sir.

Q. Do I understand you correctly that you do not recall whether it was the night that we are discussing here, August 20th, that Berry came into the bar? A. Berry?

(Testimony of Vincent Bruno.)

Q. I mean Lieberman.

A. Repeat that, please.

Q. I will withdraw the question. Do you know now to the best of your recollection whether it is this particular night, August 20th, 1945, that Lieberman came into the bar?

A. I don't recollect the day at all. I just remember the night that he came in there.

Q. Just one night?

A. He took me in the back and asked me those questions.

Q. Over how long a period of time did you know Lieberman and see him coming into the bar?

A. Oh, I don't know. I just met him at the hotel I think just about a month or so before that.

Q. So for about a month or so Lieberman was coming in and out of the bar, is that correct?

A. After we got acquainted he used to come down to the bar and [53] drink.

Q. And on some evening, of which you do not know the date, he came into the bar and the two of you went back to the washroom, is that correct?

A. That is right.

Q. Do you ever recall that similar transaction occurring at any other time?

A. He never did call me in the back before.

Q. Only the once?

A. Just that one time.

Q. What did he say to you when he came in the bar?

A. When he came into the bar he said, "Hello,

(Testimony of Vincent Bruno.)

Vince. How are you?" He said, "Come in the back. I want to talk to you."

Q. Do I understand your testimony correctly to be that all that conversation was about having a game—I presume a card game—in his room later?

A. That is right. We played cards there before.

Q. You recall at that time, as far as you know, he bent down and tied his shoe, is that correct?

A. I think that is what he did. He bent down and I am pretty sure he tied his shoe up.

Q. You are not certain?

A. I am pretty sure.

Q. Have you ever been convicted of a felony?

A. Never. [54]

Q. Isn't it a fact that you were convicted in this court in 1937?

A. That was not a felony. The way I understand, if you are sent to a county jail it is not a felony.

Mr. Davis: Well, I think the witness is mistaken.

The Witness: That was for obscene literature.

Mr. Davis: If the Court please, I will ask leave to subpena the District Clerk to bring in the record in Case 26099-S.

The Court: The Clerk can get them now. Do you want just the file, Mr. Davis, or do you want the docket entries?

Mr. Davis: I think the file will be sufficient.

The Court: Just the file.

Mr. Duane: In the interest of time, if the Court please. I might say this to your Honor: There will be an objection made to Mr. Davis' offer and I want

(Testimony of Vincent Bruno.)

to argue it very briefly, and I would like to do it out of the presence of the jury. I am prepared to do it now. As I say, in the interests of time, I can do it in just a few minutes.

The Court: While we are waiting for the Clerk to bring the record down, I will give the Jury a brief recess and we can discuss the matter if you wish in the absence of the Jury. You may step down.

Mr. Linehan, will you take the Jury out to the jury room. You may be excused for a few moments. Please bear in mind the admonition of the Court.

(The Jury retired from the courtroom and the following proceedings took place out of the hearing of the Jury:)

Mr. Davis: If the Court please, also in the interests of saving time we are prepared to show that on March 23, 1937, this defendant, Vincent Bruno, plead guilty to an indictment charging a violation of 18 USC 334, sending obscene letter through the mail. He plead guilty to that charge on that date and he was sentenced to 90 days in county jail. I believe Mr. Duane is of the opinion, and perhaps has so informed his client, that following the state rule, if he received less than a one-year sentence it would not be a felony, and I respectfully submit that no matter what the sentence is, in the Federal Court, in view of the fact that the indictment with which he is charged carries a felony penalty, that the defendant would be guilty of a

(Testimony of Vincent Bruno.)
felony even if he had merely been placed on probation.

Mr. Duane: I might say in answer to that, if the Court please, I recall very definitely authorities on that subject. I am taken surprise here, because I did not know this matter was coming up or I would be prepared for it. The rule has been the same as our state law, that where the defendant is sent to the county jail, the penalty fixes the degree. If the defendant is sent to the county jail, the conviction is a misdemeanor. There are Federal authorities on that subject. If we had time, I would like to submit them, but it is some years since I went into the question. [56]

The Court: We give probation frequently, Mr. Duane, where there has been a conviction, either by plea or at the trial of a felony charge. That has nothing to do in Federal procedure with whether or not there has been a conviction of a felony. Applicants for citizenship, for example, are required to disclose all those matters irrespective of the extent and nature of the punishment. The defendant may be under the apprehension that because he received of punishment of only ninety days that he had not been convicted of a felony, but there is nothing that I know of in the Federal law that is to the contrary. The matter came up at one of the conferences in the circuit, one of the Judicial Conferences, and some of the judges wanted to amend the statute on that particular subject.

Mr. Duane: I feel very definite on it. I have

(Testimony of Vincent Bruno.)

read decisions on that question, not recently, and I could not cite them to your Honor at this time, but I am sure that they are there.

Mr. Davis: If the Court please, I am so well satisfied—the matter comes up in our office every few days or every few weeks. I have discussed it often with attorneys and called their attention to the fact, even when they have discussed the possibility of pleading their clients, and I have called their attention to the difference between the state and the Federal rules. I have no doubt about it.

The Court: No one has ever raised that question before me as yet, and I have had cases, of course, where this same question [57] has been asked in criminal cases and I have never heard this point raised.

Mr. Duane: There is this much to be said. If Mr. Davis is right—I won't say he is not right—there may be later authorities holding the way Mr. Davis contends.. But if he is right, then it was not the contention of this defendant on the stand to deny he was convicted.

The Court: He said about the time the United States asked to have the file sent for that he had only served a county jail sentence, so I think you are perfectly at liberty, if the United States Attorney does not do that, to bring that out yourself, of course.

Mr. Davis: All I want to put it in for, your Honor, is for the purpose of conforming to the usual rule that the conviction of a felony can be considered

(Testimony of Vincent Bruno.)

in construing the credibility of a witness. I have no doubt the defendant was not trying to deny the conviction of this particular offense.

The Court: He is not denying the proceedings that took place. He just thought he was not guilty of a felony. There was a plea of guilty according to the record and a judgment of 90 days' imprisonment.

Well, bring the Jury back.

(The Jury returned to the courtroom and the following proceedings were had in the presence of the Jury:)

The Court: The Jurors are all present. You may proceed. [58]

VINCENT BRUNO

recalled; previously sworn.

Cross-Examination
(Resumed)

By Mr. Davis:

I will reframe the question.

Q. Mr. Bruno, have you ever been convicted of a felony? A. Is that a felony now?

The Court: You may give any answer that you feel is a proper answer to the question and then explain it.

The Witness: They convicted me in the Federal court on an obscene literature charge. I do not know whether it is a felony or not, sir.

(Testimony of Vincent Bruno.)

Q. (By Mr. Davis): If I told you that it was a felony under the law, your answer would be that as far as you know you do not know whether it was a felony or misdemeanor?

A. As far as I know, I do not know what it is. I was informed if you are sent to a county jail it automatically is a misdemeanor.

Q. Your purpose in answering my question originally as to answering that you were not convicted of a felony was not based upon any desire to hide the true facts, but, according to you, upon a misapprehension as to what conviction of that particular crime meant, is that correct?

A. That is right. That is way I was informed, sir.

Mr. Davis: That is all. [59]

Redirect Examination

By Mr. Duane:

Q. As a matter of fact, you were sentenced to 90 days in the county jail, isn't that so?

A. That is right.

Q. That offense had nothing to do with narcotics?

A. No, sir.

Mr. Duane: That is all.

Mr. Davis: That is all.

The Court: That is all.

Mr. Duane: That is our case, if the Court please.

The Court: Did you wish to argue this case, gentlemen?

Mr. Davis: A very brief argument so far as the Government is concerned.

Mr. Duane: I think it will be brief, if the Court please.

The Court: I suppose you will want to know about the instructions before you argue?

Mr. Davis: I think it would be well.

The Court: I have not looked at the defendant's proposed instructions yet. I just had a chance to look at the plaintiff's. Would you like to have about a five-minute recess before you argue the case?

Mr. Davis: Yes.

Mr. Duane: Yes.

The Court: Then I can inform you about the rulings on the instructions. I am sorry, ladies and gentlemen, you will have [60] to take another trip outside for a brief period. Remember the admonition of the Court.

(The Jury again retired from the courtroom and the following proceedings were had in their absence:)

The Court: I will advise counsel as to the rulings of the Court on the proposed instructions in accordance with the rules. I have looked at all the Government's proposed instructions and I will say in substance that they appear to be proper. I do not intend to give them all in as much detail as that in which they are submitted, nor in repetitious form, but in substance I will give to the Jury the provisions of the Harrison Act and the Jones-Miller Act, the burden of proof and the effect of possession under the statute, and I will also give in substance—

I assume the defense would want me to give the entrapment instruction.

Mr. Duane: Yes, your Honor.

The Court: As to the defendant's instructions, in substance the first one—they are not numbered, Mr. Duane, but I am taking them in the order in which I have them in front of me—I shall instruct as to the presumption of innocence. I shall give in substance the second and third proposed instructions; also the next one and the next one. You are familiar, Mr. Duane, with the way I instruct the Jury anyhow. I may not use the exact language, but I endeavor to give in substance the general subject matter that you refer to there. Likewise the next one. [61] Now, this instruction that has no number but has the case of Steiner vs. United States quoted——

Mr. Duane: Yes.

The Court: I think I would not want to give that. I think that is a bad instruction for the defendant. It is more than substantial evidence that is required. It is evidence that produces conviction beyond a reasonable doubt.

The next instruction is in connection with the entrapment instruction. I will give that in substance. And the next instruction about suspicion. I usually endeavor to give that. The next instruction has to do with entrapment. I will give the general instruction that I always give on that subject.

The proposed instruction with respect to the Jury's duty in deciding in accordance with the larger number of witnesses will be given; the next

one as well. I will give an instruction on reasonable doubt that I think fairly covers what you have in mind. The next one is proper. The next one is proper. I will give an instruction similar to People vs. Murphy, or similar to the one given in People vs. Murphy, except that I phrase it that the defendants are entitled to the independent judgment of each juror.

As to the next one, I would not single out any witness as to that but will instruct the Jury generally as to the standards by which they may determine what witness, if any of the witnesses, show bias and prejudice, and if they testified falsely [62] the Jury may disregard their testimony.

I will instruct that the Jury may take into account conviction of a felony in the case of any witness.

The last instruction I have no objection to giving. I shall give a stronger one for the defendant than that. That is the one about the two different conclusions. If you wish me to give that instruction, I will give it. That is the one about two different conclusions being drawn from the testimony of the witness, the very last one. It has four citations, United States vs. Lancaster, and other cases. You may have yours in different order. If you wish, I will give that instruction, but I usually give a stronger one.

Mr. Duane: I would be satisfied to have your instruction.

The Court: Do you want to agree how long you want to talk? I do not ask you to do that. I think

I will give the case to the Jury tonight. You probably won't take more than ten or fifteen minutes each?

Mr. Davis: I do not believe so.

Mr. Duane: I do not think so.

The Court: That will enable me to give the case to the Jury about a quarter past three or so. We will take a brief recess.

(Thereupon a brief recess was taken. The Jury was brought back to the courtroom and counsel for the Government and counsel for the defendant made closing statements to the Jury, after which the Court instructed the Jury as follows:) [63]

The Court: Ladies and gentlemen, the case you have to decide is an important one. All cases that juries have to determine, particularly in a criminal field, are important cases. They are important both to the Government and to the party who is charged with crime. Therefore they require on the part of the members of a Jury a completely impartial, unprejudiced consideration. The Jury in a Federal court is a part of a team with the Judge that we both want for the purpose of accomplishing the administration of justice. Our functions are somewhat different. The Jury decides the question of facts, and it is the province of the Jury entirely to make the decision as to the facts. In this matter the question for the Jury to determine is the guilt or innocence of the defendant. The Court does not interfere with that province of the Jury. I have

no notion as to what your verdict should be in this case. That is entirely and exclusively your function and your province. You are not to assume from anything the Court may have said in ruling upon any objections during the course of the trial that the Court has any opinion as to what your verdict should be. I haven't any such opinion.

Now, also, it is well to call your attention to the fact that you may not interfere with the province of the Judge. The Judge tells you what the law is, and whether you like the law or not is beside the question. You must take the law as the Judge gives it to you. [64]

You must exclude in this case any prejudice or sympathy that you may have. You are not to concern yourself with the manner of punishment of the defendant in the event that you bring in a verdict of guilty, because the matter of punishment in the event of a finding of guilt is exclusively a function of the Court. You must keep in mind, as I told you when you were impaneled, that because the defendant was indicted or charged with these offenses, it does not follow that he is guilty. That is, there is no presumption because of the fact that he has been charged that he is guilty. The defendant is presumed under the traditional precepts of our system of law to be innocent, and that presumption continues until the evidence introduced for and on behalf of the Government proves his guilt beyond a reasonable doubt.

The burden of proving the guilt of the defendant is on the Government. It never shifts to the defend-

ant. Perhaps you should know what is meant by the statement that you can't find the defendant guilty until his guilt is established beyond a reasonable doubt, particularly what is the meaning of the term "reasonable doubt." The definition that I give to Jurors is a comparatively simple one. "Reasonable doubt" is what the term itself implies: It means a doubt that is based on reason. It does not mean every conceivable doubt. It does not mean a doubt that may be a fanciful doubt or an imaginary doubt or one that is captious or speculative. It means an honest doubt [65] that appeals to reason and is founded on reason.

If after considering the evidence in this case you have such a doubt in your mind as would cause you or some reasonable person to pause and hesitate before acting in some grave transaction in your own life, then you have such a doubt as the law contemplates to be a reasonable doubt. The rule of reasonable doubt applies to every material element of the event which is charged.

Now, ladies and gentlemen, whether you believe the witnesses who have testified in this case, and the weight that is to be attached to their testimony respectively, is a matter for your sole and exclusive judgment. We start out with a presumption in every case that a witness is presumed to speak the truth. We mean by that when he steps up and sits in this chair, before he opens his mouth, we presume he is going to speak the truth. However, that presumption may thereafter as he testifies be negatived by the manner in which he testifies, by the character

of his testimony, by contradictory evidence, by his motives, by evidence as to his character and reputation for truth, honesty and integrity, and also there may be taken into account whether or not he has ever been convicted of a felony. In this case both one of the witnesses for the Government and the defendant have been convicted of a felony. You may take that into account in evaluating the testimony of these respective witnesses in deciding how much weight you want to attach to [66] their evidence respectively. You may accept or reject the whole or any part of the testimony of a witness. If it is shown to you that a witness has testified falsely in any respect upon any material matter, you may distrust his testimony in other respects and in that event you may reject all of the witness' testimony.

In order to evaluate the weight of the witness' testimony there are some standards of practice you may take into account. Among these are the circumstances under which the witness testifies, his demeanor and the manner on the stand, his intelligence, relationship which he bears to the Government or the defendant, the manner in which he might be affected by your verdict, the extent to which he is contradicted or corroborated by other evidence, if at all, and any other matter which reasonably sheds light upon the credibility of the witness.

If there has been any testimony stricken out in the case, you must not take it into account, nor should you take into account any testimony to which there has been an objection sustained. You need

not necessarily decide the case in favor of the side which has produced the greater number of witnesses against a lesser number on the other side. It makes no difference how many witnesses testify. It is not number that produces conviction, but the quality of the testimony weighed according to these various standards which I have given you.

The attorneys have argued the case, as is their right, and [67] indeed their duty. In doing so they have stated what the evidence is. If you find any discrepancy between the evidence as testified to by the witnesses and that stated to be the testimony by the attorneys in their arguments, you will discard the statements of the attorneys and consider only the evidence as it was given by the witnesses.

It is possible that there may have been, or you may find that there were, some discrepancies or inconsistencies in the testimony of a witness or between the testimony of one witness and that of another. Do not pay any attention to those discrepancies unless they reasonably bear upon the guilt or innocence of the defendant. If they do, take them into account; otherwise they are not worthy of your serious consideration.

You must at all times remember that the defendant is entitled to any reasonable doubt that you may have in your minds, and also at the same time remember if you have no such doubt, then the Government is entitled to a verdict.

The defendant has testified in this case in his own behalf. That being so, you will determine his credibility according to the same standards applied

to any other witness, and when the defendant takes the stand he becomes a witness. These standards I have already pointed out to you. You may also consider in connection with the testimony of the defendant the interests he may have in his case, his hopes and his fears, and what he has to gain or lose as the result of your verdict. The defendant [68] is entitled to the independent consideration of each and every juror in coming to a verdict.

In this case there has been some mention of the fact that the Government has used an informer in the investigation of the case and also as a witness. It is true that the Government is permitted to use informers to assist in the enforcement of the law and to present the opportunity to violate the law to a person believed to have been engaged in the commission of a crime. The Government need not reveal the identity of the informer nor produce such informer as a witness in the trial of a case in which the informer assisted the Government, for the reason that it is the duty of every citizen to communicate to his Government any information which he has of the commission of an offense against its laws; and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.

I should like to also advise you as to the law on what is commonly known as entrapment. Where the officers of the law have incited a person to commit the crime charged and lured him on to its consummation with the purpose of arresting him, [69] the law will not authorize a verdict of guilty, but if the intent and purpose to violate the law are present, the mere fact that public officers furnished the opportunity is no defense. The Government is not engaged in the business of manufacturing criminals; it has enough to do to prevent the commission of crime. But it often becomes necessary for Government officers and agents to match their wits against the wits of the man who is deliberately violating the law or who has violated the law and in such a case the officers or agents may afford him an opportunity to commit a crime.

If a man is engaged and prepared to break the law, the mere fact that employees of the Government put it in his power to break it and thereby capture him in the act of breaking it does not constitute an entrapment and is no defense. If, however, a man has no disposition to break the law, and would not break it except that he was induced and persuaded therein by the Government, then that does constitute entrapment and would be a defense warranting an acquittal of the crime charged.

The case before you, ladies and gentlemen, is not a difficult one so far as the issues are concerned. I do not mean to imply by that statement your verdict should be one way or the other just by some simple process of mind. What I am intending to

say is the issue of the case, that is, what is claimed by the Government and what is contended by the defendant, presents a simple issue. There are two counts in this indictment, as I [70] told you. The first count charges a violation of the Harrison Narcotic Act. The substance of that charge is the sale, the dispensing of Heroin, not being in the original stamped package.

The second count of the indictment charges violation of the Jones-Miller Act, the substance of which is knowingly and fraudulently concealing and facilitating the concealment of a quantity of Heroin imported into the United States contrary to law.

Now, the Harrison Narcotic Act provides as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 1040(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession they may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Section 1383 and 1384 shall be prima facie evidence of liability to such special tax."

That is the provision of the law that applies to the first count of the indictment.

The Jones-Miller Act, which applies to the second count of the indictment, in substance provides as follows: [71]

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be punished as the law provides."

On a trial for the violation of the Jones-Miller Act, which I just read to you, if it appears that the defendant has or has had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury.

The term "narcotic drug" includes Heroin. If you are convinced from the evidence in this case beyond a reasonable doubt and to a moral certainty that the defendant now on trial had Heroin in his possession on the occasions charged in the second count of the indictment and concealed or in any manner facilitated the concealment of such Heroin, you will find the defendant guilty unless he has explained his possession of the Heroin to your satisfaction.

If you are satisfied beyond a reasonable doubt

that the defendant had possession of the narcotics described in this [72] indictment, you are at liberty to infer that the narcotics had been, to the knowledge of the defendant, imported and brought into the United States contrary to law. That is a provision of the Jones-Miller Act, which I have previously read you in part.

Therefore, the issue in this case, ladies and gentlemen, for you to decide, is whether or not you are convinced beyond a reasonable doubt under the first count of the indictment the defendant sold and dispensed the Heroin referred to in this case in violation of the Harrison Narcotic Act. Under the second count of the indictment you are called upon to determine whether or not you feel beyond a reasonable doubt from the evidence presented the defendant knowingly and fraudulently concealed and facilitated the concealment of a certain quantity of Heroin.

If you can conscientiously do so, ladies and gentlemen, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If anyone of you should become convinced your view of the case is erroneous, you should not be stubborn and refuse to abandon your own view under such circumstances. On the other hand it is entirely proper to adhere to your own view if, after a full exchange of ideas, you still believe you are right.

What I have just said does not modify the instruction which I previously gave you that the defendant is entitled to the [73] independent

judgment of each of you. I have only indicated in what I have just said that having in mind the defendant is entitled to the independent judgment of each member of the Jury, that independent judgment should be considered judgment and not an unreasoning and stubborn judgment.

If it should become necessary for the Jury to communicate with the Court during its deliberations or upon its return to the Court respecting any matter connected with the trial of this case, you should not indicate to the Court how the Jury stands numerically or otherwise on the question of the guilt or the innocence of the defendant. This caution the Jury should observe at all times after the case is submitted to it and until the Jury reaches a verdict. I read that perhaps rapidly, but in simple language what I was intending to say to you was if there should be any reason for your having any communication while you are deliberating, before you have reached a verdict, you should not in any communication that you send to the Court indicate in any manner how you stand at that time numerically with respect to the guilt or innocence of the defendant.

Whenever all of you agree to a verdict it is a verdict of the Jury. In other words, your verdict must be unanimous. You should not return to the courtroom or authorize your foreman to sign a verdict unless and until all of you have agreed to it.

When you retire to deliberate, you may select one of your number as foreman or forelady, as the case

may be, and he or [74] she will sign your verdict for you and he or she will represent you as your spokesman in the further conduct of this case in this court.

We have prepared a form of verdict for you, ladies and gentlemen. It reads as follows:

> "We the Jury find Vincent Bruno, the defendant at the bar, ... as to count one of the indictment, ... as to count two of the indictment."

In the blank space you will insert guilty or not guilty in each instance. This form is prepared for your convenience and is not intended to indicate to you in any manner what your verdict should be.

Does either side wish to note any exceptions to the Court's charge?

Mr. Davis: None for the Government.

Mr. Duane: None.

The Court: Very well, ladies and gentlemen. You may retire to consider your verdict.

> (Thereupon, at 3:55 p.m., the Jury retired from the courtroom to deliberate upon its verdict, and at approximately 5:00 p.m. returned to the courtroom and rendered a verdict of guilty as to count one of the indictment and guilty as to count two of the indictment; whereupon, the Court sentenced the defendant to serve a term of five years on count one and ten years on count two, terms of imprisonment to run consecutively, and fined the defendant $5,000 on count two.) [75]

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 75 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: No. 11589. United States Circuit Court of Appeals for the Ninth Circuit. Vincent Bruno, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 17, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,589

United States Circuit Court of Appeals

For the Ninth Circuit

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division

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Brief for Appellant

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United States Circuit Court of Appeals

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Brief for Appellant

JURISDICTIONAL STATEMENT

Appellant, Vincent Bruno, was indicted for violating the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557, and the Jones-Miller Act, 21 U.S.C. 174 (R. 2-3).* The indictment was in two counts, the first

*Reference to the Transcript of Record are preceded by the letter "R"; references to the Supplemental Record are preceded by the letters "SR."

charging appellant with selling heroin "not in or from the original stamped package," contrary to the Harrison Narcotic Act, and the second charging appellant with fraudulently and knowingly concealing and facilitating the concealment of the lot of heroin described in the first count, contrary to the provisions of the Jones-Miller Act (R. 2-3).

Appellant pleaded "not guilty" to the indictment (R. 5-6), and after a trial by jury, was convicted on both counts (R. 12-13). His motions for a new trial and in arrest of judgment were denied (R. 6-8, 15), and he was sentenced to a term of five years in a Federal prison on count one of the indictment and to a term of ten years and to pay a fine of $5,000 on count two, the sentences on the two counts to run consecutively (R. 13-14).

The District Court had jurisdiction of this action by virtue of provisions of 28 U.S.C.A. sec. 41, subd. 2, which provides that the District Courts shall have original jurisdiction "of all crimes and offenses cognizable under the authority of the United States," and by virtue of the following Amendment—Six—to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

This Court has jurisdiction to review the judgment by virtue of 28 U.S.C.A. sec. 225, which provides: "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions,—First in the District Court, in all cases save where a direct review of the

decision may be had in the Supreme Court, under section 345 of this Title."

The pleadings on which jurisdiction is based are the Indictment (R. 2-3) and the Plea of Not Guilty (R. 5-6).

STATEMENT OF FACTS

About 10:30 P.M. of August 20, 1945, a special Government employee by the name of Lieberman met with appellant at the Stardust Bar on the corner of Larkin and Sutter Streets, San Francisco, California (SR. 44-45). According to Lieberman's testimony he and appellant went to the mens' room on the premises and there appellant sold him a bindle of heroin for $50.00 (SR. 45-46).

Before meeting with appellant Lieberman had been searched for narcotics by a Government agent named Grady and given two $50.00 bills (SR. 27). After the alleged purchase, Lieberman again met with Grady about a block from the Stardust Bar where he handed Grady a bindle of heroin and returned one of the $50.00 bills previously given him (SR. 30).

Appellant, while admitting meeting with Lieberman on the night in question, denied that he sold Lieberman any narcotics (SR. 60-63). The jury found appellant guilty on both counts (SR. 86), and he was sentenced by the Court to five years imprisonment on the first count and to ten years imprisonment and to pay a fine of $5,000 on the second count, the sentences to run consecutively (R. 13-14).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

1. That appellant was twice put in jeopardy for the same offense.

ARGUMENT

The Proof at the Trial Below Established Only One Offense and the Court Below Consequently Erred in Sentencing Appellant Twice.

The Constitutional principle that no one should be put in jeopardy twice for the same offense "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange,* 85 U.S. 163, 173, 21 L.Ed. 872, 878. Since a criminal is twice punished for the same offense when the evidence necessary to prove either offense will necessarily establish the other also (*Schroeder v. United States,* 7 F.(2d) 60 (C.C.A. 2); *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6); *Woods v. United States,* 26 F.(2d) 63 (C.C.A. 8)), and since, in the case at bar, the evidence under the first count necessarily proved the crime charged in the second count, appellant was twice punished for the same offense contrary to the provisions of the Fifth Amendment to the Constitution.

The first count of the indictment charges appellant with unlawfully selling, dispensing and distributing "not in or from the original stamped package, a certain quantity of * * * heroin," (R. 2), contrary to the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557. The pertinent provisions of that Act are as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *"

The second count charges "That at the time and place mentioned in the first count * * * defendant fraudulently and knowingly did conceal and facilitate the concealment of said * * * lot of heroin * * *," contrary to the Jones-Miller Act, 21 U.S.C. 174, which provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The sole factual showing at the trial below in support of the two convictions was the testimony of Lieberman that on the night in question appellant sold him a bindle of heroin. There was not a word of testimony to show,

as alleged in the second count, that appellant "fraudulently and knowingly did conceal and facilitate the concealment of the heroin." Indeed, the only possession shown at all was the possession appellant had for the purpose of the sale. The Government's case on the second count, therefore, rests solely on the statutory presumption that possession of the narcotic drug, without more, is sufficient evidence on which to base a conviction.

But this presumption, it will be observed, relies solely and entirely on one of the essential facts necessary for a conviction under the first count. The first count charges that appellant "did sell, dispense, and distribute" a certain lot of heroin not in or from the original stamped package. Obviously, to have sold, dispensed and distributed the heroin in question, appellant must have had possession of the drug. And since this possession, without more, is sufficient for conviction under the second count (because of the statutory presumption contained in the Jones-Miller Act), the Government, by proving a violation of the Harrison Narcotic Act, automatically proves a violation of the Jones-Miller Act. The one necessarily follows from the other. As a result, one offense leads unjustifiably to two sentences.

But before proceeding further with this analysis and before examining the authorities in support of appellant's contention, two other problems, nearly-identical with the one here, should be distinguished. The first of these nearly-identical problems is the familiar one of when a defendant is being twice *tried* for the same offense. The confusion between this problem and the one considered in this brief arises principally because the tests used in solving the

problems are almost alike. "The test in determining whether more than one offense is charged in an indictment or denounced by statute is whether or not each proposed offense requires proof of some fact which the others do not." *Dimenza v. Johnston,* 130 F.(2d) 465, 466 (C.C.A. 9); cf. *Michener v. Johnston,* 141 F.(2d) 171, footnote 3 (C.C.A. 9). As pointed out above, the test in determining whether a defendant has been twice sentenced for the same offense is whether the evidence necessary to prove either offense will necessarily establish the other also.

Appellant, however, does not contend that he was twice tried for the same offense. He concedes that the indictment sets out two separate offenses; for had the Government been able to show the actual concealment of the heroin prior to the sale as well as the sale itself, two separate offenses would have been established. And since the indictment charged facts which, *if proved,* would have constituted two separate offenses, the indictment was sufficient and appellant was not tried twice for the same offense. *Gargano v. United States,* 140 F.(2d) 118 (C.C.A. 9); *Silverman v. United States,* 59 F.(2d) 636 (C.C.A. 1), certiorari denied 287 U.S. 640. But such proof was not produced. The problem, therefore, is not one of the sufficiency of the indictment but rather whether two separate offenses were sufficiently *proved* to warrant two sentences.

The second nearly-identical problem that must be distinguished from the question here is the problem whether two sentences may be imposed where one offense contains all the necessary elements of another. See, for example, *Michener v. United States,* 157 F.(2d) 616 (C.C.A. 8), reversed .... U.S. ...., 91 L.Ed. Ad. Op. 1213 (June 2,

1947), where the Court considered the problem whether a defendant who has been convicted of making a plate to be used in counterfeiting Federal Reserve Notes may be sentenced also for having the same plate in his possession, the question arising because in making the plate the defendant must necessarily have had the possession of it. The cases treating this and similar problems have been numerous but are not in point here. The problem facing this Court is not whether a second offense has been shown within the facts of the first offense, but rather whether *one* of the facts of the first offense, insufficient in itself to prove the second offense, can be made to constitute an entire crime by means of a statutory presumption alone. In other words, the Government in proving the first crime did not show that appellant had concealed the heroin; it proved only a sale and delivery and then argued, impliedly, that since the sale and delivery required possession of the heroin and possession alone was sufficient under the presumption in the second count, the sale and delivery proved the concealment. It is to be noted that in the *Michener* and similar cases *all* the facts necessary to prove the second crime were shown in proving the first offense.

A careful search of the authorities has revealed only two cases treating the identical question at hand and both, one directly and the other indirectly, condemned the imposition of double sentence. These cases are *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6) and *Ex parte Thomas,* 55 F. Supp. 30 (E.D. Ky.).

The *Copperthwaite* case is squarely in point. There, as here:

"Appellants were convicted under both counts of an indictment, the first of which charged the purchase and sale of unstamped morphine in violation of the Harrison Anti-Narcotic Act (Sec. 692, Tit. 26, U.S.C.A.)*, and the second of which charged, as of the same time and place, the buying and selling of the same amounts of morphine which they knew had been unlawfully imported into the United States, thus constituting an offense under the Narcotic Import Statute (Sec. 174, Tit. 21, U.S.C.A.). They were sentenced to five years imprisonment under the first count and ten years under the second count—the two terms to be concurrent" (at 847).

With respect to the question of double punishment, the Court said:

"* * * The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended —by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. *In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis.*" (At 847-848. Emphasis supplied.)

In *Ex parte Thomas, supra,* the Court considered the same question and recognized that if the Government

*Now section 2553 of the same title.

relied solely on the statutory presumption to prove the second offense, the defendant was twice placed in jeopardy. The Court in that case, however, found that the record did not clearly show that the Government relied on the presumption contained in the statute and accordingly held that double jeopardy was not shown.

Furthermore, the language of the Jones-Miller Act, itself, indicates that Congress did not intend the presumption to apply where the defendant was on trial for an offense under another act. The statute plainly provides that the presumption is to apply "whenever [the defendant is] on trial for a violation of *this section.*"* Had Congress intended no limitation on the application of the presumption, there would have been no need for including the quoted words in the act; the same result could then have been accomplished by providing, simply, that "*whenever* the defendant is shown to have or to have had possession of the narcotic drug, such possession should be deemed sufficient evidence to authorize conviction." "In view of the rule, that a legislative body is presumed to have used no superfluous words in a statute * * *, and the rule that 'effect shall be given to every clause and part of a statute'," (*Pacific Gas & Electric Co. v. Securities & Exchange Commission,* 127 F.(2d) 378, 382 (C.C.A. 9)), the presumption was improperly applied in this case.

Appellant, therefore, was twice placed in jeopardy for the same offense contrary to the provisions of the Constitution and the intention of Congress. The court below, therefore, erred in sentencing appellant twice. The second

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*Emphasis supplied.

of those two sentences, it is respectfully submitted, should be set aside; first, because the Government had not fulfilled its burden of establishing the second offense, and secondly, because the court in imposing sentence on the first of the two offenses "exhausted its power to sentence, and the sentence on count two was void." *Holbrook v. Hunter,* 149 F.(2d) 230, 232 (C.C.A. 10).

CONCLUSION

The court below erred in imposing sentence on count two of the indictment. The judgment of the court below, therefore, should be modified by striking the judgment on the second count.

Dated: August 11, 1947.

Respectfully submitted,

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No. 11,589

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VINCENT BRUNO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VINCENT BRUNO,
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vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 9-10) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant, after a jury trial, of a violation of the Harrison Narcotic Act (26 U.S.C. 2553 and 2557) and the Jones-Miller Act (21 U.S.C. 174). The indictment alleged in the first count that the defendant, on or about the 20th day of August, 1945, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, a bindle of heroin.

In the second count, the indictment alleged that at the time and place mentioned in the first count, the

defendant fraudulently and knowingly did conceal and facilitate the concealment of the same heroin, which had been imported into the United States of America contrary to law, as said defendant then and there knew. (Tr. 2-3.)

The Court below had jurisdiction under the provisions of Title 28 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

On the evening of August 20, 1945, Federal Narcotic Agent Grady and Special Employee Lieberman drove in a Government automobile to the corner of Bush and Larkin Streets in San Francisco. Agent Grady searched Lieberman, found that he had no narcotics on his person and gave him two $50.00 bills, marked so they could be identified. Lieberman, under the observation of Agent Grady, walked to the Star Dust Bar at the corner of Larkin and Sutter Streets and entered. (Supp. Tr. 27-31 and 44-45.)

Upon entering the bar, Lieberman met the defendant and the following events transpired:

(Lieberman) "When I met him, Bruno told me that he was expecting me. He told me to follow him, and I followed him. We went to the rear of the bar and we turned right and we opened up the door. We went into a men's washroom over there. He went

ahead and gave me a bindle of Heroin. I told him I wanted two. He said, 'No, I thought you said, according to the telephone conversation, I thought it was only one.'

"So then he told me, 'If you want to wait about a half an hour I will give you the two of them.'

"I said, 'No, I have to go back to my hotel.'

"I asked him what he gets for the bindles. He said $50. I had two $50 bills in my possession which I received from Agent Grady. I gave him the $50 and I told him I would see him later at the hotel. But we then walked out together, right out the entrance to the bar, right into the street. I looked up and down. I told him 'I am going to look around for a cab to go back to the hotel.'" (Supp. Tr. 45-46.)

After the purchase, Lieberman met Agent Grady at a prearranged location in the vicinity, where he turned over the bindle of heroin and one of the $50 bills. (Supp. Tr. 29-31 and 46.)

The appellant, while admitting that he met Lieberman in the bar on that night, denied that he sold him narcotics. (Supp. Tr. 60-63.)

QUESTION.

Do the facts as established prove two separate offenses or only one?

ARGUMENT.

The appellant does not deny that the indictment states two separate offenses nor that the two offenses, i.e., sale and concealment, may arise out of one transaction. (Appellant's Brief p. 7.) He argues, however, that the evidence was not sufficient to *prove* the two offenses because the only proof of concealment was that raised by the presumption, under the statute (21 U.S.C. 174)[1], and that this possession was only a possession incident to the sale.

The facts in the instant case are practically identical with the facts in *Silverman v. United States,* 59 F. (2d) 636, certiorari denied, 287 U. S. 640, and in the recent case of *Sorrentino v. United States* (C.C.A.-9 No. 11,533), decided by this Honorable Court on September 4, 1947.

In the latter case the defendant entered a house and sold a can of opium to a Government agent; in this case the defendant entered a wash-room and sold a bindle of heroin to a Government Agent. In each case the only proof of concealment was the presumption arising from the possession and the possession was only for the purposes of the sale. Upon the same facts this Court held: "The two counts charged two distinct offenses. Both were amply proved."

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[1] "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

CONCLUSION.

For the reasons stated, we respectfully submit that the decision of the lower Court should be affirmed.

Dated, San Francisco, California,
September 22, 1947.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,

Attorneys for Appellee.

No. 11591

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRED GERARD and ROSE GERARD,
Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife and FRED SHUPE,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

Rotary Colorprint, 870 Brannan Street, San Francisco 6-4-47—60

No. 11591

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MR. S. J. RIGNEY,
Cut Bank, Montana,
Attorney for Appellant and Plaintiffs.

MR. JOHN B. TANSIL,
United States District Attorney,
Billings, Montana,
Attorney for Defendant,
United States of America, Appellee.

MR. LLOYD A. MURRILLS,
Cut Bank, Montana,
Attorney for Defendants,
J. L. Sherburne, et al., Appellees.

MR. H. C. HALL,
Great Falls, Montana,
Attorney for Defendant,
W. H. Mercer, et al., Appellees.

MR. LOUIS P. DONOVAN,
Shelby, Montana,
Attorney for Defendant,
Fred Shupe, Appellee.

MR. LOUIS P. DONOVAN,
Shelby, Montana, and
MR. WILBUR P. WERNER,
Cut Bank, Montana,
Attorneys for Defendants,
Guy McConaha, et al, Appellees. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
District of Montana, Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,
Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE, Husband and Wife; FRED SHUPE and MARY DOE SHUPE, His Wife, if any; GUY McCONAHA and IDA McCONAHA, His Wife; W. R. McDONALD and E. MARIE McDONALD, His Wife; EARL JOHNSON and MRS. EARL JOHNSON, His Wife; W. H. MERCER and GEMMA N. MERCER, His Wife, if any; MILTON MERCER and CARMA MERCER, His Wife; G. S. FRARY and BESSIE L. FRARY, His Wife; THE UNITED STATES OF AMERICA and all other persons unknown, who claim or may claim some right, title, estate or interest in the property described in the bill in equity or complaint, or lien or encumbrance thereon, adverse to complainants ownership, or any cloud upon complainants' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

BILL OF COMPLAINT

Come now the plaintiffs, Rose Gerard and Fred Gerard, husband and wife. and for their cause of action against the above-named defendants, and each of them, jointly and severally allege as follows:

I.

This is a civil action brought by the above-named plaintiffs, [3] Rose Gerard and Fred Gerard, and the Court has jurisdiction under and by virtue of Section 24 (1) (24) of the Judicial Code, 28 U.S.C., Section 41 (1) (24); Section 345 of Title 25 U.S. C.A. and under and by virtue of various treaties duly entered into and adopted by and between the Blackfeet Tribe of Indians and the United States and particularly the treaty commonly known as the Agreement of 1887, executed February 11, 1887, and ratified May 1, 1888, 25 Stat., 113, (particularly Sec. VI of said agreement) and the agreement commonly known as the Treaty of 1896 with the Blackfeet Tribe of Indians, ratified September 26, 1896, 29 Stat. 358 (particularly Article IX of said agreement); and the General Allotment Act of February 8, 1887, 24 Stat., 388, Section 348 of Title 25 U.S.C.A.

II.

That at all of the times herein mentioned Rose Gerard and Fred Gerard, and each of them, were Indian persons, wards of the United States and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state and district of Montana.

III.

That the defendants, J. L. Sherburne and Eula Sherburne, husband and wife; Fred Shupe and Mary Doe Shupe, his wife, if any; Guy McConaha and Ida McConaha, his wife; W. R. McDonald and E. Marie McDonald, his wife; Earl Johnson and Mrs. Earl Johnson, his wife; W. H. Mercer and Gemma N. Mercer, his wife; Milton Mercer and Carma Mercer, his wife; G. S. Frary and Bessie L. Frary, his wife, are citizens of the United States and all reside at Browning, Montana, except G. S. Frary and Bessie L. Frary, who reside at Cut Bank, Montana, and Fred Shupe and Mary Doe Shupe, his wife, if any, whose last known address is Shelby, Montana; that the defendant, the United States of America, is the guardian of the plaintiff's and by reason thereof has or may claim an interest in the premises involved in this proceeding. [4]

IV.

That Rose Gerard, an Indian Ward of the United States, was allotted the following described land within the state and district of Montana and within the county of Glacier, known as allotment No. 2192, and described as follows:

> East Half Southwest Quarter (E½SW¼), Southeast Quarter (SE¼) of Section Twenty-eight (28), and West Half Northwest Quarter (W½NW¼) of Section Thirty-four (34) in Township 36 North of Range 12 West, Montana Meridian;

That Fred Gerard, also an Indian Ward of the

United States, was allotted the following described land within the state and district of Montana and within the county of Glacier, designated allotment No. 2191, and described as follows:

> Lots Two (2), Three (3), Southeast Quarter Northwest Quarter (SE¼NW¼), Southwest Quarter Northeast Quarter (SW¼NE¼), East Half Southwest Quarter (E½SW¼), West Half Southeast Quarter (W½SE¼) of Section Four (4) in Township 35 North of Range 12 West, Montana Meridian.

Each of the foregoing allotments comprise approximately three hundred and twenty (320) acres.

V.

That on February 28, 1918, trust patents were issued to each of the above-named plaintiffs for the above-described lands as designated in the preceding paragraph by the United States pursuant to the provisions of the Treaty of 1887 set out in the preceding paragraph No. I, under the provisions of which agreement the United States specifically promised and agreed as follows:

> "Upon the approval of said allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of

his decease, of his heirs, according to the laws of the Territory of Montana, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever. And if any conveyance shall be made of said lands, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:"

That the said allotments were authorized pursuant to the above-mentioned agreement of 1887 by the General Allotment Act of February 8, 1887, 24 Stat. 788, which contains the provision set out by the said agreement to the effect that the United States would hold the land thus allotted in trust for the said allottees for a period of twenty-five years and after the expiration of that time the United States of America would convey the same by patent in fee to the Indian discharged of the trust and free of all charges and encumbrances whatsoever, the relevant portion of said trust patent in each allotment being as follows:

"Now Know Ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of

twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law;"

Prior to the expiration of the trust period of twenty-five years on or about the 18th day of June, 1934, the trust period was indefinitely extended by Section 2 of the Act of June 18, 1934, 48 Stat., 984, commonly known as the Wheeler-Howard Bill.

VI.

That thereafter on or about the 11th day of June, 1918, there was issued to said Rose Gerard and also Fred Gerard certain fee patents to the lands and premises described in preceding paragraph No. IV; that the said fee patents so issued on the 11th day of June, 1918, were issued in direct contradiction of and in violation of the promise and agreement of the United States that it would hold the said lands in trust for the said plaintiffs and each of said plaintiffs for a period of twenty- [6] five years and would issue a fee patent until the expiration of such period; that the fee patents, when issued,

were issued without any application being made by the said plaintiffs or either of the said plaintiffs therefor, and were issued to them and each of them without their consent to the issuance of the same. That the fee patents and each of the fee patents so issued were in direct violation of the agreement provisions of Agreement of 1887, cited and referred to in paragraph I hereof, and that the said fee patents did not convey any right, title or interest to the plaintiffs other than that theretofore conveyed by the trust patent for each of said tracts and that the said fee patents should be held to convey only what the agreement and general allotment act of February 11, 1887, authorized for the reason that the said fee patents expressly provided that they were made subject to immunities and restrictions imposed by law. That by reason of the agreement of 1887 heretofore cited and the General Allotment Act of 1887, plaintiffs acquired a vested right of which they could not be deprived, directly or indirectly, by their own voluntary acts or by operation of law, whether by tax deed, voluntary conveyance or otherwise.

VII.

That the complainants are now, and at all times herein mentioned have been, the owners of and entitled to the immediate possession of the lands and premises hereinbefore described which said lands were duly allotted to the complainants and each of them by the United States; that said lands are within the boundaries of said Indian Reservation

in Glacier County, Montana, and that the Blackfeet Indian Reservation belongs to the Blackfeet Indian Tribe and has been set apart to said tribe as an independent unit so recognized by law and by treaty agreements made by and between it and the United States, and that the plaintiffs have and still do keep up their tribal membership and tribal relations [7] and that at all times the said Blackfeet Indian Tribe has been recognized by law as an independent nation and treated as such by the United States; that under the agreement of 1887, above referred to, which said agreement has the effect of a treaty by and between the United States and the Blackfeet Tribe of Indians, these plaintiffs became entitled under the said treaty to the lands and premises allotted to them as set out in paragraph IV of this complaint. That the right of the complainants under the said Agreement of 1887 was subsequently confirmed by Article IX of the Agreement of 1896 which provides as follows:

> "The provisions of Article VI of the agreement between the parties hereto, made February 11, 1887, are hereby continued in full force and effect, as are also all the provisions of said agreement not in conflict with the provisions of this agreement."

That the right of restriction on alienation was and is a vested right that could not be divested by subsequent act of Congress or by issuance of a fee simple patent which did not contain notice of the restriction on alienation provisions of the Agree-

ment of 1887, and the General Allotment Act of February 8, 1887, both of which are cited herein.

VIII.

That after the fee patents were issued Glacier County, Montana, purported to levy and assess said lands heretofore described as the property of the complainants; that the taxes so levied and assessed became delinquent and thereafter Glacier County attempted and purported to sell the same for delinquent taxes and later, by quit claim deed, conveyed the same to W. R. McDonald. That said deed was given on or about the 25th day of October, 1930, and was and is null and void for the reason that the lands were immune from taxation under the Agreements, General Allotment Act, and the specific provisions of the trust patents, and the immunity clause of the fee patent, immune from taxation by Glacier County or the taxing authorities of the state of Montana, and any and all rights [8] or claims of the above named defendants, or either or any of said defendants, were and are null and void and of no effect.

IX.

That neither of the said plaintiffs was ever found competent by the United States to receive a fee patent for the said lands or any part thereof; that they never applied for a patent and never consented to the issuance of a fee patent and that the said fee patent was issued to them within approximately four months after the issuance of the trust patents and was forced upon them by representations of the

officials of the Indian Bureau of the United States in Washington, D. C., and the Indian Agency at Browning, Montana, to the effect that the patent in fee must be accepted and that the lands must be rendered subject to taxation by the taxing authorities under the laws of the State of Montana; that any conveyance or transfer made by the plaintiffs or either of them, by mortgage or otherwise, was never approved by the President of the United States, or by the Secretary of the Interior, or any official of the United States having authority to approve any contract or transfer of real property made by any member of the Blackfeet Tribe of Indians; that if any such transfer was made, the same was null and void under the agreements and statutes hereinbefore cited.

X.

That each of the fee patents issued to the plaintiffs for the respective allotments hereinbefore described in part expressly provides:

> "To have and to hold the same, together with all the rights, provisions, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever;"

The foregoing clause recognizes the immunities provided by law and the provisions of the trust patent, issued some four months previously, and such construction is in harmony with the [9] General Allotment Act of 1887 and the Agreement of 1887 hereinbefore cited. That any other construc-

tion of the terms of the fee patents renders the issuance of the fee patent null and void and of no force or effect for any purpose.

XI

The plaintiffs further allege that the defendants, J. L. Sherburne and Eula Sherburne, husband and wife, Fred Shupe and Mary Doe Shupe, his wife, if any, Guy McConaha and Ida McConaha, his wife, W. R. McDonald and E. Marie McDonald, his wife, Earl Johnson and Mrs. Earl Johnson, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, and each and all of them claim some right, title or interest in or to, or assert some claim, lien or demand upon the real property described in paragraph IV of this complaint superior to the title of each of these plaintiffs; that such claims and assertions of claim are void and of no legal force or effect and that the ownership of the plaintiffs, subject to any claim of title by the United States by virtue of its guardianship of the plaintiffs, is superior to any right, title or interest claimed or that may be claimed by any of the said defendants or of any lien, claim or demand whatsoever of the defendants in and to the same, or any part thereof. That the defendant, the United States, may rightfully claim some right, title or interest in and to said lands by reason of its guardianship of the plaintiffs, but that if the fee patent issued by the United States for the said lands and each tract thereof is construed to remove

immunities and restrictions on alienation by the plaintiffs, then such fee patents were and are null and void for all purposes and should be so adjudged and determined by this Court.

Wherefore, the plaintiffs, and each of them, pray judgment against the defendants and each of them respectfully, as follows: [10]

(1) That the defendants and each of them be adjudged to have no right, title or interest in and to the real property described in this complaint or any lien, claim or demand whatsoever against the same or any part thereof, save and except that any interest the United States may claim as guardian of the complainants.

(2) That the fee patents, issued to the complainants on or about June 11, 1918, be held and determined to have been issued without the application or consent of the complainants, or either of them, and that any right, claim or interest claimed by any of the defendants, except the United States, be determined to have been without any right and null and void for all purposes.

(3) That the complainants be declared to be the owners of the respective tracts claimed by each of the said complainants and to have the right of immediate possession, subject to such right as the United States may have as guardian of the complainants.

(4) That the lands be adjudged to be inalienable, and immune from taxation during the period of restriction on alienation provided by law.

(5) For such other and further relief as the

complainants, or either of the complainants, may show herself or himself to be entitled.

(6) For complainants' costs and disbursements necessarily expended herein.

S. J. RIGNEY,
Attorney for the
Complainants. [11]

VERIFICATION

State of Montana,
County of Glacier—ss.

Rose Gerard and Fred Gerard, each for herself and himself, being separately duly sworn, on oath depose and say: that they are the complainants named in the foregoing entitled action; that each of said Affiants has read the foregoing complaint and knows the contents thereof and that the allegations and matters therein alleged are true of her or his own knowledge except as to those matters stated on information and belief and as to those matters they believe it to be true.

ROSE GERARD,
FRED GERARD.

Subscribed and sworn to before me this 7th day of September, 1945.

[Seal] S. J. RIGNEY,
Notary Public for the State of Montana, residing at Cut Bank.

My commission expires Feb. 6, 1948.

[Endorsed]: Filed Sept. 20, 1945. [12]

[Title of District Court and Cause.]

MOTION OF DEFENDANT UNITED STATES OF AMERICA TO DISMISS

Now Comes Harlow Pease, Assistant United States Attorney in and for the District of Montana, and as such, one of the attorneys for the defendant, United States of America, and moves the Court that this cause be dismissed as to the defendant United States of America on the following grounds, to-wit:

I.

That the court does not have jurisdiction of the subject matter of this action.

II.

That the United States of America has not consented to be sued or made party defendant in this cause.

This motion is based upon the complaint in this cause.

HARLOW PEASE,
Assistant United States Attorney in and for the District of Montana.

[Endorsed]: Filed Nov. 1, 1945. [14]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, J. L. Sherburne and Eula Sherburne, husband and wife, and move the court as follows:

I.

To dismiss the action because the complaint fails to state a claim against these defendants upon which relief can be granted;

II.

To dismiss the action because there is a misjoinder of separate causes of action, in that causes of action relating to the separate allotments of the two plaintiffs, Rose and Fred Gerard, have been joined in one complaint, when in fact the causes of action and defenses thereto, respecting each allotment are separate and distinct; the two allotments referred to are described in paragraph IV of the complaint.

Done this 29th day of November, 1945.

LLOYD A. MURRILLS,
Cut Bank, Montana,
Attorney for J. L. Sherburne and Eula Sherburne.

Service of and receipt of copy of foregoing Motion to Dismiss acknowledged this 29th day of November, 1945.

S. J. RIGNEY,
Attorney for Complainants.

[Endorsed]: Filed Nov. 30, 1945. [16]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now the above named defendants, G. S. Frary and Bessie L. Frary, his wife, and move to

dismiss the complaint of plaintiffs in the above entitled action upon the ground and for the reason that said complaint fails to state a claim upon which relief can be granted in favor of said complainants, or either thereof, and against these defendants, or either thereof.

H. C. HALL,
414 Strain Building,
Great Falls, Montana,
Attorney for Defendants.

[Endorsed]: Filed Dec. 3, 1945. [18]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now the above named defendants, W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife, and move to dismiss the complaint of plaintiffs in the above entitled action upon the ground and for the reason that said complaint fails to state a claim upon which relief can be granted in favor of said complainants, or either thereof, and against these defendants, or either thereof.

H. C. HALL,
414 Strain Building,
Great Falls, Montana,
Attorney for Defendants.

[Endorsed]: Filed Dec. 3, 1945.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, FRED SHUPE, TO DISMISS CIVIL ACTION No. 698

The defendant, Fred Shupe, moves the Court as follows:

(1) To dismiss the action because the Complaint fails to state a claim against this defendant, Fred Shupe, upon which relief can be granted;

(2) To dismiss the action because the right of action, if any, set forth in the Complaint, did not accrue within ten years next before the commencement of this action;

(3) To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter in controversy;

(4) To dismiss the action on the ground that the Court lacks jurisdiction of United States of America, and that United States of America is an indispensable party to the action and it has not consented to be sued or made a party defendant in this cause.

/s/ LOUIS P. DONOVAN,
Shelby, Montana,
Attorney for defendant,
Fred Shupe.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 13, 1945. [22]

In the District Court of the United States
in and for the District of Montana

Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,
Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE, Husband and Wife; FRED SHUPE and MARY DOE SHUPE, His Wife, if any; GUY McCONAHA and IDA McCONAHA, His Wife; W. R. McDONALD and E. MARIE McDONALD, His Wife; EARL JOHNSON and MRS. EARL JOHNSON, His Wife; W. H. MERCER and GEMMA N. MERCER, His Wife, if any; MILTON MERCER and CARMA MERCER, His Wife; G. S. FRARY and BESSIE L. FRARY, His Wife; THE UNITED STATES OF AMERICA and all other persons unknown, who claim or may claim some right, title, estate or interest in the property described in the bill in equity or complaint, or lien or encumbrance thereon, adverse to complainants' ownership, or any cloud upon complainants' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

SUMMONS

To the above named Defendants (except the United States of America):

You are hereby summoned and required to serve upon S. J. Rigney, plaintiffs' attorney, whose address is Cut Bank, Montana, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

September 20th, 1945.

[Seal] H. H. WALKER,
Clerk of Court.
By C. G. KEGEL,
Deputy. [25]

MARSHAL'S RETURNS ON SERVICE OF SUMMONS

District of Montana—ss.

I hereby certify and return, that on the 5th day of January, 1946, I received the within Summons and that after diligent search, I am unable to find the within-named defendants Fred Shupe and Mary Doe Shupe within my district.

GEORGE A. WRIGHT,
United States Marshal.
By BERNARD J. REILLY,
Deputy United States
Marshal.

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Guy McConaha and Ida McConaha by handing to and leaving (two true and correct copies thereof with copies of complaint attached) with their daughter Betty McConaha Olsen at the usual place of abode personally at 25 miles N. Browning in said District on the 7th day of January, A.D. 1946.

GEORGE A. WRIGHT,
United States Marshal.
By BERNARD J. REILLY,
Deputy.

United States of America,
District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return that I served the annexed Summons with copy of Complaint attached on the therein-named G. S. Frary and Bessie L. Frary by handing to and leaving a true and correct copy thereof with them personally at Browning in said District on the 19th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By EDGAR TAYLOR,
Deputy. [26]

United States of America,
District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return that I served the annexed Summons with copy of Complaint attached on the therein-named J. L. Sherburne and Eula Sherburne at Browning in Glacier County, Montana, by handing to and leaving a true and correct copy thereof with them personally at Browning in said District on the 19th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By EDGAR TAYLOR,
Deputy.

District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return, that on the 17th day of November, 1945, I received the within Summons and that after diligent search, I am unable to find the within-named defendants Earl Johnson and Mrs. Earl Johnson within my district.

GEORGE A. WRIGHT,
United States Marshal.
By ETHEL FLEMING,
Deputy United States
Marshal.

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons, with copy of Complaint attached on the therein-named W. R. McDonald by handing to and leaving a true and correct copy thereof with him personally at Browning in said District on the 14th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy. [27]

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons, with copy of Complaint attached on the therein-named E. Marie McDonald by handing to and leaving a true and correct copy thereof with W. R. McDonald, her husband, at her home personally at Browning in said District on the 14th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy.

District of Montana—ss.

I hereby certify and return, that on the 14th day of November, 1945, I received the within Summons

and that after diligent search, I am unable to find the within-named defendants W. H. Mercer, Gemma N. Mercer, Milton Mercer and Carma Mercer within my district. Reported to be at Prosser, Wash.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy United States
Marshal.

[Endorsed]: Filed Jan. 18, 1946.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS, GUY McCONAHA AND IDA McCONAHA, TO DISMISS CIVIL ACTION No. 698.

The defendants, Guy McConaha and Ida McConaha, move the Court as follows:

(1) To dismiss the action because the Complaint fails to state a claim against these defendants, Guy McConaha and Ida McConaha, upon which relief can be granted;

(2) To dismiss the action because the right of action, if any, set forth in the Complaint, did not accrue within ten years next before the commencement of this action;

(3) To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter in controversy;

District of Montana—ss.

(4) To dismiss the action on the ground that the Court lacks jurisdiction of United States of America, and that United States of America is an indispensable party of the action and it has not consented to be sued or made a party defendant in this cause.

/s/ LOUIS P. DONOVAN,
Shelby, Montana,

/s/ WILBUR P. WERNER,
Shelby, Montana,

Attorneys for defendants,
Guy McConaha and
Ida McConaha.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 22, 1946. [30]

In the District Court of the United States
in and for the District of Montana
Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,
Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE, husband and wife; FRED SHUPE and MARY DOE SHUPE, his wife, if any; GUY McCONAHA and IDA McCONAHA, his wife, et al.,
Defendants.

DECISION

The above-entitled cause, pending on motions to dismiss by the several defendants, is substantially the same case that was before the court on motions of defendants to dismiss over a year ago, with the exceptions that the United States is here added as a party defendant and some of the parties named in the first case as complainants have been omitted. (No. 525, Gerard v. Mercer, et al., 62 F. Supp. 28.) Six motions to dismiss on the part of defendants have now been submitted to the court for consideration, and most of the objections to the complaint in the first case have been re-asserted. Motions to dismiss in the first case were granted, and no appeal taken, otherwise the several objections raised to the

complaint in this case might have been disposed of, and duplication of effort avoided. Counsel for complainants claim authority under Title 25, Sec. 345, U. S. C. A. for making the United States a party defendant in this case.

In the other case (Gerard et al. v. Glacier County et al, supra, and hereinafter referred to as the first case) the court dwelt at considerable length on the question of whether the United States should be regarded as an indispensable [33] party to the action, without deciding in what manner the United States could be brought into the action as a party, but that its presence was indispensable. Under some of the authorities there cited it would seem possible that such a result might be attained by making the United States a party defendant as in the present action; but such a course is seriously challenged by counsel for the defendants, and authorities have been presented, some allegedly in favor of and others against, the right of the complainants to proceed in this manner. Counsel for complainants strongly rely upon Arenas v. U. S., 322 U. S. 419, 429, as a precedent in point and favorable to their contention. That the above decision is based upon an entirely different state of facts would seem clear from a comparison. In the Arenas case the statute cited as a basis for the decision (25 U. S. C. A. 345) was directly in point, and applied specifically to the principal fact in question which was the withholding from the Indian plaintiff of his allotment, to which he seemed rightfully entitled, and which was shown to be long overdue.

In the first case the court held that the United States was an indispensable party to the action, and is now of the same opinion. In this action the United States Attorney has moved for a dismissal on the ground that the United States cannot be sued therein without its consent, and that such consent has not been given, and counsel further contend that such act is without legal effect, and that no statute or authority exists authorizing it. Great stress has been laid upon the decision in the United States v. Eastman, 118 F. (2) 421, 423, Certiorari denied, 314 U. S. 635, in which the Circuit Court of Appeals for this Circuit in an opinion by Judge Healy held that the statute there in question (Title 25, Sec. 345, U. S. C. A.) was intended only to compel the making of an allotment in the first instance, and the [34] language used is: "The trial court thought that leave to sue the United States is found in the Act of August 15, 1894, as amended, 25 U. S. C. A. Sec. 345. We are not able to agree. It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the Government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the Government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed."

In that case the Indian allotees claimed to have the right to sell timber on their allotments without restriction or charge, and that regulations of the Secretary of the Interior were without legal force. The Indians made the United States a party and sought to enjoin the enforcement of these regulations. The material parts of the statute above cited are set forth so that the full force and meaning of its terms may be considered; it is labeled: "Actions for Allotments", and states that all persons described therein who are entitled to an allotment of land under any law of Congress, or "Who claim to have been unlawfully denied or excluded from any allotment, or any parcel of land, to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole, or in part, of Indian blood or descent, to any [35] allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to any allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *"

The last sentence above quoted, as well as other

parts of the Act, would clearly indicate that the sole purpose of this statute is to authorize the Indian to bring a suit against the United States to require the Secretary to make an allotment of land to him, which he may assert has been denied to him or from which he has been excluded, and to which he claims to be lawfully entitled by virtue of some Act of Congress. It was said in the United States v. U. S. Fidelity and Guaranty Co., 309 U. S. 514: "* * * It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."

The purpose of the present action is to quiet title and set aside and annul patents in fee which were issued by the United States, under authority of an Act of Congress, to the complainants about twenty-seven years ago, and which they now assert were issued to them without their application or consent. The court is unable to understand how the language of the above statute can be so construed as to authorize the complainants to sue the United States in the present action without consent in the first instance, or how an [36] action can be maintained unless by intervention or by an action voluntarily

instituted by the United States as plaintiff against the above-named defendants. That the United States is an indispensable party seems to have been demonstrated by citation of authorities in the first case, but it does not clearly appear therefrom how the presence of the United States as a party to such an action is to be accomplished. In speaking of the obligation of the Government to act promptly in protecting the rights of the Indian, the court held in Maknomen County v. The State of Minnesota, 131 F. (2) 936, 938, 939, that "* * * in the strict and diligent performance of its trust, the United States should have applied to its courts for decree or decrees avoiding the apparent lien of taxes illegally assessed * * * but time does not run against the sovereign and its right to resort to its courts in aid of the performance of governmental obligation is not restricted to any particular form of action* * *."

Counsel for complainants state that if the court does not find authority to sue the United States in Title 25, Section 345 as interpreted by the Supreme Court in Arenas v. United States, supra, then such authority will be found by implication in United States v. Hellard, 322 U. S. 363, 368, wherein the court said: "But as stated by Mr. Justice Brandeis speaking for the court in Minnesota v. the United States, supra, p. 388, authorization to bring an action involving restricted lands confers by implication permission to sue the United States."

The question in the Hellard case was whether

full-blooded Indians of the Five Civilized Tribes could be divested of title to restricted land by a sale in partition proceedings to which the United States was not a party: "A full blood Creek Indian died leaving heirs of the full blood. They inherited certain lands from her, lands which were subject [37] to restrictions on alienation both in her hands and in the hands of the heirs. By Section 2 of the Act of June 14, 1918 (25 U. S. C. A. Sec. 355, 40 Stat. 606) Congress declared that such lands were "made subject to the laws of the state of Oklahoma, providing for the partition of real estate." By Section 3 of the Act of April 12, 1926 (44 Stat. 239) Congress provided for the service upon the superintendent for the Five Civilized Tribes of a prescribed written notice of the pendency of any suit to which a restricted member of the Tribes in Oklahoma or the restricted heirs of grantees are parties and which involves claims to "lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same". By that Act the United States is given an opportunity to appear in the cause and is bound by the judgment which is entered. Here the statute provides that the United States may appear in the case and a prescribed written notice must be served upon the superintendent. This action was begun in the state court as authorized but no notice was given the superintendent and the United States was not made a party. This was restricted Indian land at the time of suit in which the United States had a

direct interest; the court said that the governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. The Government is necessarily interested in partition proceedings affecting restricted land where such course is desirable, and in seeing that the best possible price is obtained on a sale, and in re-investment of the proceeds, and is further interested in protecting the preferential right of the Secretary of the Interior to purchase the land at a sale for another Indian, as provided in Sec. 2 of the Act of June 26, 1936, 49 Stat. 1967. With such an involvement of restricted Indian lands it is not difficult to understand why Mr. Justice Douglas in the Hellard case referred to [38] Minnesota v. United States, supra, as affording an illustration of a similar complication in respect to restricted Indian lands, wherein it was suggested that such an involvement of restricted Indian lands would "confer by implication permission to sue the United States." But that case is so entirely different from the case now under consideration that by comparison of the facts and questions presented the actions appear to be clearly distinguishable.

Here the complainants are trying to set aside and annul a patent in fee issued to them many years ago, under authorization by Congress, on the belated claim that they never applied for or consented to the issuance of such a patent. It does not appear that permission to sue the United States has been conferred by implication in this action. If in this case the United States is not properly before the

court as a defendant, which the court has plainly indicated, then this case, like the first case, constitutes a collateral attack on the patent in fee which this court there held could not be sustained.

The further objection of counsel for defendants that no allegation is contained in the complaint bringing complainants within the provisions of Sections 352(a) and 352(b), Title 25 U. S. C. A. is sustained in this case as it was in the first.

A further discussion of the questions presented here and in the first case would seem unnecessary to reach a decision on the disposal of the motions to dismiss, and would only unduly extend the argument. In view of the attitude of the court in both cases and decision made on pertinent objections raised to the complaint, in the opinion of the court, the proper order at this time would be one of dismissal, affording the parties an opportunity for appeal and for final settlement of the questions that are impeding progress in this litigation, and such is the order of the court herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Feb. 8, 1947. [39]

In the District Court of the United States
District of Montana
Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,

Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE, husband and wife; FRED SHUPE and MARY DOE SHUPE, his wife, if any; GUY McCONAHA and IDA McCONAHA, his wife; W. R. McDONALD and E. MARIE McDONALD, his wife; EARL JOHNSON and MRS. EARL JOHNSON, his wife; W. H. MERCER and GEMMA N. MERCER, his wife, if any; MILTON MERCER and CARMA MERCER, his wife; G. S. FRARY and BESSIE L. FRARY, his wife; THE UNITED STATES OF AMERICA and all other persons unknown, who claim or may claim some right, title, estate or interest in the property described in the bill in equity or complaint, or lien or encumbrance thereon, adverse to complainants' ownership, or any cloud upon complainants' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

JUDGMENT OF DISMISSAL

Motions to Dismiss the above entitled action having been duly served and filed in said action on behalf of the defendants, G. S. Frary and Bessie L. Frary, husband and wife, and W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife; and said Motions to Dismiss having come on regularly for hearing before the above Court on July 24, 1946, and were on said date ordered submitted on briefs and thereafter briefs having been filed on behalf of said defendants and on behalf of said complainants, and said [41] Motions and the briefs filed in support thereof and in opposition thereto having been duly considered by the Court and the Court being duly advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that said Motions to Dismiss made by said defendants herein be and the same are hereby granted and that said action be and the same is hereby dismissed with prejudice as to said defendants, G. S. Frary and Bessie L. Frary, husband and wife, and W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife.

It Is Further Ordered, Adjudged and Decreed that said defendants have and recover of and from said plaintiffs their costs and disbursements taxed in the sum of $10.00.

Dated this 26th day of February, 1947.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed and entered Feb. 26, 1947.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT AND OF FILING MEMORANDUM OF COSTS

To the above named complainants and to S. J. Rigney, Esq., their attorney of record:

You, and Each of You, Will Please Take Notice that on the 26th day of February, 1947, Judgment was entered in the above cause dismissing complainant's Complaint, a copy of which Judgment is herewith served upon you. [44]

You will further take notice that on the 26th day of February, 1947, Memorandum of Costs and Disbursements was duly filed in said action, copy of which Memorandum is herewith served upon you.

Dated this 26th day of February, 1947.

HALL & ALEXANDER,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 26, 1947. [45]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS ON BEHALF OF G. S. FRARY, BESSIE L. FRARY, W. H. MERCER, ET AL.

	Amount Claimed	Amount Allowed
Clerk's Fees:	$	
Attorneys' docket fee:	10.00	
Total	$10.00	

Costs taxed at $10.00. March 7, 1947, in favor of G. S. Frary, et al.

H. H. WALKER, Clerk.
By C. G. KEGEL, Deputy. [47]

United States of America,
District of Montana—ss.

H. C. Hall, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants in the above entitled cause and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of his knowledge and belief and that the said disbursements have been necessarily incurred in said cause and that the services charged herein have been actually and necessarily performed as herein stated.

H. C. HALL.

Subscribed and Sworn to before me this 26th day of February, 1947.

[Notarial Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana. Residing at:
Great Falls, Montana.
My commission expires: Feb. 8, 1949.

To: The Above Named Complainants and S. J. Rigney, Their Attorney:

You will please take notice that on the 7th day of March, 1947, at Great Falls, Montana, at the hour of 10:00 o'clock a.m., application will be made to the

clerk of the above court to have the above costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

HALL & ALEXANDER,
Attorneys for defendants.

[Endorsed]: Filed Feb. 26, 1947. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To The Defendants, United States of America, and John B. Tansil, Esq., United States Attorney for the District of Montana, attorney for said defendant; J. L. Sherburne and Eula Sherburne, husband and wife, and Murrills & Frisbee, attorneys for said defendants; G. S. Frary and Bessie L. Frary, his wife, and H. C. Hall, attorney for said defendants; W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, and H. C. Hall, attorney for said defendants; Guy McConaha and Ida McConaha, his wife, and Louis P. Donovan and Wilbur P. Werner, attorneys for said defendants; Fred Shupe and Louis P. Donovan, attorney for said defendant:

You, and each of you, will please take notice that the plaintiffs, Fred Gerard and Rose Gerard, above named, do [50] hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order dismissing the complaint of the plaintiffs made and entered in this action on or about Febru-

ary 8, 1947, and the judgment dismissing said action made and entered on or about the 26th day of February, 1947.

Dated this 24th day of March, 1947.

S. J. RIGNEY,
Attorney for plaintiff and appellants, Fred Gerard and Rose Gerard.
Address: Box 186, Cut Bank, Montana.

[Endorsed]: Filed March 27, 1947. [51]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents,

That, we, the undersigned, Rose Gerard and Fred Gerard, as principals, and Brian Connolly and Mary Adams and ..... of ....., Glacier County, Montana, as sureties, are held and firmly bound unto the defendants, and each of the defendants named, in the foregoing entitled action, in the sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said defendants, their successors or assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 19th day of March, [53] 1947.

The Condition Of The Above Obligation Is Such That, whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Rose Gerard and Fred Gerard are complainants and J. L. Sherburne and Eula Sherburne, husband and wife, Fred Shupe and Mary Doe Shupe, his wife, if any, Guy McConaha and Ida McConaha, his wife, W. R. McDonald and E. Marie McDonald, his wife, Earl Johnson and Mrs. Earl Johnson, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, The United States of America, are defendants, an order dismissing the action was made and rendered on or about the 8th day of February, 1947, and a judgment of dismissal of the action was made and entered therein on or about the 26th day of February, 1947; and,

Whereas, the above named complainants, Rose Gerard and Fred Gerard have filed in said action their notice of appeal from said order and judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit and said complainants propose to prosecute said appeal to reverse said order and said judgment;

Now, Therefore, in consideration of said appeal, the said complainants, Rose Gerard and Fred Gerard, as such complainants, shall pay all costs if the appeal is dismissed or the order and judgment affirmed, or such costs as the Appellate Court may

award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal] ROSE GERARD,

[Seal] FRED GERARD,
Principals. [54]

[Seal] BRIAN CONNOLLY,

[Seal] MARY ADAMS,

[Seal] .....

[Seal] .....
Sureties.

State of Montana,
County of Glacier—ss.

Brian Connolly and Mary Adams and .....
....., residents of Glacier County, Montana, being first severally sworn, on oath, each for himself, deposes and says:

That they are residents and free holders within Glacier County, Montana, and that they are worth the amount of money specified in the foregoing bonds as the principals thereof, to-wit: Two Hundred Fifty Dollars over and above all of their just debts and liabilities and property exempt from execution.

BRIAN CONNOLLY,
MARY ADAMS.

.....

.....

Subscribed and sworn to before me this 19th day of March, 1947.

[Seal] PANSY CAVANAGH,
Notary Public for the State of Montana, residing at Browning, Montana.
My commission expires March 15, 1950. [55]

State of Montana,
County of Glacier—ss.

Edward Murphy by G. A. Norman, Deputy, do hereby certify and declare as follows, to-wit: That I am the duly elected, qualified and acting Deputy Assessor of Glacier County, Montana, and that Brian Connolly and Mary Adams and ...., the sureties named in the within and foregoing bond on appeal, appear as owners of real estate and personal property upon the assessment and tax records of Glacier County, Montana, in values as follows:

Mary Adams in the sum of $400;
Brian Connolly in the sum of $3400;
..... in the sum of $.....

In Witness Whereof I have hereunto set my hand and affixed my signature as Assessor aforesaid on this 19th day of March, 1947.

EDWARD MURPHY,
Assessor of Glacier County, Montana.
G. A. NORMAN, Deputy.

[Endorsed]: Filed March 27, 1947. [56]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL OF COMPLAINANTS, ROSE GERARD AND FRED GERARD.

Whereas, the complainants, Rose Gerard and Fred Gerard, have heretofore filed notice of appeal in the above entitled action to the United States Circuit Court of Appeals of the Ninth Circuit from the Order dismissing plaintiffs complaint and from the judgment of dismissal rendered and entered in the above entitled action on the 26th day of February, 1947:

Now, Therefore, the said Appellants do hereby designate the following portions of the record, proceedings and evidence to be contained in the record of transcript on appeal of the above entitled cause on appeal, and respectfully request the same to be incorporated in the said transcript on appeal, to-wit: [58]

(1) Plaintiffs complaint;

(2) Summons;

(3) Motion of the Defendant, United States of America, to dismiss plaintiffs complaint;

(4) Motion of Defendants, G. S. Frary and Bessie L. Frary, to dismiss plaintiffs complaint;

(5) Motion of Defendants, W. R. Mercer and Gemma N. Mercer and Milton Mercer and Carma Mercer, to dismiss plaintiffs complaint;

(6) Motion of defendants, Guy McConaha and Ida McConaha, to dismiss plaintiffs complaint;

(7) Motion of defendants, J. L. Sherburne and Eula Sherburne, to dismiss plaintiffs complaint;

(8) Motion of defendant, Fred Shupe, to dismiss plaintiffs complaint;

(10) Order of the court dismissing complaint filed and entered on or about February 8, 1947;

(11) Judgment of court dismissing complaint filed on or about February 26, 1947;

(12) Notice of entry of judgment;

(13) Memorandum of costs on judgment dismissing complaint;

(14) Court minutes in said action;

(15) Notice of Appeal;

(16) Bond on Appeal;

(17) Entry on civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and bond on appeal with date of mailing;

(18) Designation of contents of record on appeal;

(19) Please endorse respective dates of filing of foregoing [59] several proceedings in the above entitled court.

Dated this 24th day of March, 1947.

S. J. RIGNEY,
Attorney for Appellants, Rose Gerard and Fred Gerard.

[Endorsed]: Filed April 5, 1947. [60]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he deposited in the United States Post Office at Cut Bank, Montana, postage fully prepaid, in an envelope securely sealed, a true and correct copy of designation of contents of record on appeal, of complainants, Rose Gerard and Fred Gerard, in the above entitled action, to Louis P. Donovan, Attorney at Law, Shelby, Montana, attorney of record for the defendants Guy McConaha and Ida McConaha, his wife, and Fred Shupe; that there is regular daily communication by mail between the city of Shelby, Montana and Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK,
Notary Public for the State of Montana, residing at Cut Bank, Montana.
My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he mailed with postage prepaid in an envelope at the Post Office at Cut Bank, Montana, a true and correct copy of bond on appeal and a copy of designation of contents of record on appeal of complainants, Rose Gerard and Fred Gerard, in the above entiled action to John B. Tansil, United States District Attorney attorney for defendants at Billings, Montana, there being regular mail communication between the said city of Billings, Montana, and the said city of Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me, a Notary Public, this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK.
Notary Public for the State of Montana, residing at Cut Bank.
My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he deposited in the United States Post Office at Cut Bank, Montana, postage fully prepaid, in an envelope securely sealed, a true and correct copy of designation of contents of record on appeal, of complainants, Rose Gerard and Fred Gerard, in the above entitled action, to Hall & Alexander, Attorneys at Law, Strain Bldg., Great Falls, Montana, attorneys of record for the defendants G. S. Frary and Bessie L. Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife; that there is regular daily communication by mail between the city of Great Falls, Montana and Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK,
Notary Public for the State of Montana, residing at Cut Bank, Montana.
My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [63]

CLERK'S CERTIFICATE OF TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 64 pages, numbered consecutively from 1 to 64 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 698, Rose Gerard, et al vs. J. L. Sherburne, et al, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twelve and 30/100ths ($12.30) Dollars, and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 18th day of April, A.D. 1947.

[Seal] H. H. WALKER,
Clerk, U. S. District Court,
District of Montana.

By C. G. KEGEL, Deputy. [64]

[Endorsed]: No. 11591. United States Circuit Court of Appeals for the Ninth Circuit. Fred Gerard and Rose Gerard, Appellant, vs. United States of America, J. L. Sherburne and Eula Sherburne, husband and wife, G. S. Frary and Bessie L Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, Guy McConaha and Ida McConaha, his wife and Fred Shupe, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed April 21, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11591

United States Circuit Court of Appeals

For the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife and FRED SHUPE,

Appellees.

Brief of Appellants

S. J. Rigney,
Cut Bank, Montana,
Attorney for Appellants.

Upon Appeal from the District Court of the United States for the District of Montana

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No. 11591

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife and FRED SHUPE,

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JURISDICTION

This is an appeal from an order dismissing complaint of plaintiffs on motions of various defendants for a dismissal of the complaint, and judgment of dismissal of the district court of the United States for the district of Montana, Great Falls, Division, wherein these appellants were plaintiffs and United States of America, J. L. Sherburne and Eula Sherburne, husband and wife, G. S. Frary and Bessie L. Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, Guy McConaha and Ida McConaha, his wife, Fred Shupe were defendants.

The judgment, in effect, dismissed the complaint and has operated to prevent the plaintiffs from prosecuting the action perpetually. R. 26-39. The jurisdiction of the United States court was predicated upon the fact that the plaintiffs were and are enrolled blood members of the Blackfeet Tribe of Indians of Montana, and Wards of the United States, and were issued allotments on the Blackfeet Indian Reservation, and trust patents were issued to each of the plaintiffs on or about February 28, 1918; these trust patents contained the 25 year period restriction on alienation, and the further provision that the United States would at the end of the trust period convey the land to the allottees or their heirs free and clear of all incumbrances. The United States was made a party defendant for the reason that title was alleged

to be in the United States and the said court had held in a former action brought by the plaintiffs that the United States was a necessary party. 62 F. Supp. 28.

The action was further based on section 24 (1) (24) of the Judicial Code, 28 U. S. C. Section 41 (1) (24); Section 345 of Title 25 U. S. C. A.; and also under and by virtue of various treaties duly entered into and adopted by and between the Blackfeet Tribe of Indians and the United States, and particularly the treaty commonly known as the Agreement of 1887, executed February 11, 1887, and ratified May 1, 1888, 25 Stat. 113, particularly section VI of said agreement; and the Treaty of 1896 commonly known as the Treaty of 1896, ratified September 26, 1896, (Art. 9 of said agreement) 29 Stat. 358; and the General Allotment act of February 8, 1887, 24 Stat. 388, Section 348 of Title 25 U. S. C. A. (R. 2-3).

The appellate jurisdiction of the United States Court of Appeals is found in Section 225, Title 28, U. S. C. A. (first paragraph Judicial Code, Section 128, as amended), wherein the Circuit Court of Appeals is given jurisdiction in all cases, save those in which there is a direct appeal to the Supreme Court of the United States. No such direct appeal is permissible in this case (section 345, Title 28 U. S. C. A.).

STATEMENT OF CASE

The complaint filed September 20, 1945, in the district court for the District of Montana, Great Falls Division, (R. 2-14) substantially alleges that the

plaintiffs, Rose Gerard and Fred Gerard, are Indian persons, Wards of the United States, and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state and district of Montana (R. 3, 4, 5); that each of said plaintiffs was allotted 320 acres of land on the said Blackfeet Indian Reservation,—Rose Gerard, Allotment No. 2192 (R. 4) and Fred Gerard No. 2191 (R. 5) and that on February 28, 1918, trust patents were issued to the plaintiffs (R. 5-7); that said trust patents contained identical provisions restricting alienation for a period of 25 years from the date of issuance of trust patent, and also the promise of the United States "that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty five years, in trust for the sole use and benefit of the said Indian and at the expiration of the said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever:" etc. (R. 6-7).

Prior to the expiration of the trust period, on or about the 11th day of June, 1918, a fee patent was issued to each of said appellants without application therefor by appellants, or either of them, and without their consent. These fee patents were forced on the appellants; there never was any finding of competency. That said fee patents and each of them were issued in direct violation of the Treaty of 1887 (supra), and the General Allotment Act of February

8, 1887, 24 Stat. 388, Section 348 Title 25 U. S. C. A. (R. 7-10).

That directly after the issuance of the **forced** fee patents in 1918, the lands so allotted and patented to the appellants were placed on the tax rolls of Glacier County, Montana, and taxes were levied and assessed against said lands each and every year after 1918 until the present. That said taxes so assessed and levied were null and void; that said taxes were not paid; that said taxes became delinquent and Glacier County attempted and purported to sell the same for delinquent taxes, later took a tax deed for both of said allotments, and thereafter conveyed its tax deed title to W. R. McDonald, about the 25th day of October, 1930; that the claims of all the defendants, except the United States, are based on the Tax Deed taken by Glacier County for alleged and purported taxes assessed and levied by Glacier County and allowed to become delinquent (R. 10-11).

That neither of said appellants were ever found competent by the United States to receive a fee patent; that neither of the appellants ever applied for or consented to the issuance of a fee patent; that fee patents were issued to each of said appellant's within four months after the issuance of the respective trust patents, and were **forced** on the appellants by the United States. (R. 11-12). Evidence of forcing the fee patent is corroborated by the Departmental letter of April 24, 1918, from J. H. Dortch, Acting Chief Clerk to F. C. Campbell, Special Superintendent in

charge, Blackfeet School. Every material point in case of U. S. v. Glacier County, 17 F. Supp. 411, 99 Fed. 2d. 733, is applicable.

That the defendants, other than the United States, claim some right, title or interest in and to the lands described in the complaint, but that such claim of right is without legal foundation and totally void and should be so determined by this court. (R. 12-13).

The defendants moved for dismissal as follows: The United States on the ground the Court had no jurisdiction, and the United States had not consented to be sued. (R. 15).

J. L. Sherburne and his wife on the grounds that complaint fails to state a cause of action or claim. (R. 15-16).

G. S. Frary and Bessie L. Frary on the grounds that complaint fails to state a claim on which relief can be granted in favor of complainants or either of them, or against these defendants. (R. 16-17).

The defendants, W. H. Mercer and wife, and Milton Mercer and wife on the same grounds as in case of G. S. Frary and wife. (R. 17).

The defendant, Fred Shupe, on the ground: (1) that the complaint fails to state a claim against this defendant; (2) that the right of action, if any, did not accrue within ten years next before it was commenced; (3) that the court is without jurisdiction, and (4) that the United States is an indispensable party to the action and it has not consented to be sued. (R. 18).

The defendants, Guy McConaha and wife, on the

ground the court lacks jurisdiction, and that the United States is an indispensable party and has not consented to be sued. (R. 24-25).

Summons was duly issued, served and returned. (R. 20-24). All the defendants appeared by motion to dismiss and the legal effect of each motion to dismiss was based on same grounds:

(1) The United States was and is an indispensable party and was made a defendant without its consent;

(2) The complaint was a collateral attack on a fee patent issued by the United States;

(3) That the complaint was insufficient to allege a claim against the defendants.

Thereafter the trial court filed its written decision, (R. 26-34) to the effect that the six motions to dismiss should be granted and the various defendants were entitled to their costs. Judgment of dismissal was made as to a number of defendants. (R. 36).

QUESTIONS PRESENTED

The questions presented in this appeal may be briefly stated as follows:

First. Where a fee patent has been forced upon a Ward Indian of the United States by the United States, without the application of the said Indian Ward, or without his consent, also without a finding of competency as to said Indian Ward, can the said Indian Ward prosecute an action to cancel said fee patent, or can he disregard the fee patent and maintain and prosecute his right of possession to the allotment

under the provisions of law and the express terms of the trust patent itself as against third persons who claim title and have possession under a tax deed conveyance made by Glacier County for delinquent taxes assessed and levied within the 25 year period of restriction?

Second. Can a restricted Ward Indian maintain and prosecute an action against the United States and third persons in possession of his allotment under claim of title based on a tax deed without the consent of the United States, the Ward Indian being excluded from his allotment only by the third part claimants?

Third. Can a restricted Ward Indian maintain an action against a third person in possession of his allotment under a claim of right based on a tax deed for taxes unlawfully assessed and levied against said allotment during the period of restriction, said Indian never having applied for or consented to the issuance of a fee patent, or even been found competent to be issued a fee patent?

Fourth. Can a Ward Indian maintain and prosecute an action to quiet title, secure his right of possession to his allotted lands before the termination of the trust period, he not having applied for or consented to the issuance of a fee patent, without making the United States a party defendant without its consent? or,

Fifth. Is the United States an **indispensable** party to an action prosecuted by an Indian Ward who is excluded from his allotment by a third party under

a tax deed claim for taxes assessed and levied before the termination of period of restriction on alienation? (A forced fee patent).

Sixth. Where an Indian Ward of the United States prosecutes an action against a third person claiming title to and having possession of said Indians allotment, under the facts set out in the preceding questions, is the United States an **Indispensable party** to the action?

Seventh. Is not an Indian Ward of the United States, excluded from his allotment during the trust period, expressly authorized to make the United States a defendant under Section 345, Title 25 U. S. C. A.?

Eighth. If such Indian Ward, under conditions set out in preceding question, is not expressly authorized under section 345, supra, does he not have **implied authority** to protect his right of possession and equitable title, or is such an Indian person at the mercy of an arbitrary Department of the United States without right of redress under present laws?

SPECIFICATIONS OF ERROR.

The appellants claim error on the part of the Trial Court as follows:

(1) The trial court erred in its decision and judgment in holding that the United States was and is an indispensable party to the action.

(2) The trial court erred in holding that the appellants could not prosecute the action without the consent of the United States and in dismissing the action

because the United States had not given its consent to be sued.

(3) The trial court erred in dismissing the complaint of the appellants as against all other defendants than the United States for the reason that the other defendants were alleged to claim title and possession to the allotments, and they alone were withholding possession and use of the land from the appellants; said defendants, other than the United States, had no community of interest with the United States and were without right in demanding the dismissal because the United States was an indispensable party and had not consented to be sued by appellants.

(4) The trial court erred in holding the appellants could not maintain and prosecute the action without a cancellation of the fee patent. Any party is entitled to assert any claim of right he may have to any interest he may claim in real property.

ARGUMENT

The question before the Court is as to the dismissal of the complaint of the Appellants on motion for dismissal by the United States and five other motions to dismiss on the part of other individual defendants. A motion to dismiss is equivalent to a demurrer and the allegations of the complaint are all taken as true for the purpose of the motion. The question before the Court in this action has been repeatedly considered by the Court in other actions, notably the case of the United States v. Glacier Co., 17 F. Supp. 411,

99 Fed. 2d. 733. With the exception of the parties involved, the Glacier County case is **identical.** Here the Appellants, Rose Gerard and her husband, are seeking to do for themselves what the United States did for some twenty-seven Blackfeet Indians in the Glacier County case just cited. In the Glacier County case the Ward Indians had fee patents forced upon them without their application or consent to the same during the period of restriction on alienation; in fact, the fee patents were issued within a short time after the issuance of the trust patents in 1918. The Indians involved in the Glacier County case afterwards lost their land through tax deeds, mortgages or other conveyances and the United States brought suit to recover the taxes that had been paid into Glacier County and to cancel the fee patents. One of the Indians involved in the Glacier County case, to-wit: Alice Aubrey Martin Whistler, had mortgaged her land and had likewise leased it for oil and gas and Judge Pray in his decision in that case held that she did not occupy a different status from the other Indians who had not mortgaged the land or otherwise conveyed it. In that case the Court held that the issuance of the fee patent under the identical circumstances that the fee patents were issued to the Appellants in this action were void and of no effect.

The Appellants requested the United States to bring an action to have their allotments restored to them but the United States, in this and other cases, has ignored the request of various Blackfeet Indians seek-

ing restoration of their allotments, where fee patents have been forced upon them, without avail. Appellants are now prosecuting this action for the purpose of doing for themselves what the United States has done for a great number of other Blackfeet Indians under the same facts and circumstances as exist as to the Appellants. The real question for the Court to decide is whether or not an Indian Ward may prosecute an action in his own name against defendants who have excluded him from his allotment, under claim of tax deed or other conveyance under the same situation and the same state of facts as exist with more than 500 other Blackfeet Indians, 27 of whom recovered their allotments in the Glacier County case, and recovered taxes that had been paid by them.

The Appellants commenced an action in the trial court more than a year prior to the commencement of this action, reported in 62 F. Supp. 28, in which action they did not make the United States a party defendant. In that action the trial court dismissed it on motions of various defendants for the reason that the United States had not been made a party defendant, holding that the United States was an indispensable party to the action. The Appellants did not appeal from that judgment for the reason that the complaint was dismissed without prejudice and the court indicated that a new action could be commenced and the United States made a party defendant so that the whole matter might be threshed out in a later action. This action and appeal is the result of the

judgment of dismissal in the former suit giving the appellants the right to file anew.

As To The United States. The motion of the United States for dismissal was based upon lack of jurisdiction and non-existence of consent to be sued, all of which is discussed under lack of jurisdiction. By Section 41 (1) (24) of Title 28 U. S. C. A., the United States consents to be sued in part as follows:

> "all actions, suits, or proceedings involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty."

By Section 345 Title 25 U. S. C. A., it is provided:

> "all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any act of Congress or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress may commence or prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty"

The two latter sections, 41 of Title 28 and 345 of Title 25 are two sections of the same Act of March 3, 1911,

Chap. 231, 36 Stat. 1167, and 36 Stat. 1090. These two sections must be construed together and that portion of section 345 reading as follows:

> "or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States;"

The last clause is the identical claim of the Appellants here. They have been excluded from allotments, deprived of the possession thereof by the defendants, other than the United States, which defendants assert claim of title or interest by virtue of tax deed issued to Glacier County, Montana, and quit claim deed from Glacier County to one or more of the said defendants. This provision appears to have been overlooked by the trial court in that no comment is made as to it. The United States Attorney in his brief in the lower court alleged that the two sections, 345 of Title 25 and 41 (1) (24) of Title 28 are the same so far as they are material to this action but he did not discuss that portion of section 345 providing for suits by the Indian where he was excluded from or deprived of his allotment.

The foregoing sections and the case of U. S. v. Eastman, 118 F. 2d. 421, were the only authorities relied upon by the United States Attorney in his motion to dismiss.

The Appellants contend that there is but one law

governing the right of an Indian to protect his interest in lands allotted to him under the laws of the United States; title to the land technically vests in the United States so long as the trust period endures. The fee patents issued to the Appellants were void under the case of U. S. v. Glacier County, supra. Therefor the Status of the allotments issued to the Appellants in 1918 was in fact trust land during the period of restriction on alienation and that restriction on alienation was a **vested right** in the land and running with the land of which the United States or any officer thereof could not deprive the Appellants by subsequent act of Congress, or by depriving the Appellants of their right to come into court and ask for the relief which would give them possession of and equitable ownership in such allotted lands.

It was evidently the intention of Congress to consent that the United States be sued by an Indian person either to obtain an allotment, or to recover posseession and his right to the allotment from which he had been **excluded** and it has been the rule of the Federal courts from the earliest times, commencing at or before the case of Worcester v. Georgia, 6 Pet. 581. to construe statutes liberally in favor of the ignorant and dependent Indian and against the other party to the action. All of these matters are very ably considered in the Glacier County case. Another question that may be material is the clause contained in the fee patent issued to the Appellants reading as follows:

> "To have and to hold the same, together with all of the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever;"

It would appear that the latter provision contained in the fee patent may have been intended to reserve to the Indian patentee all of the restrictions contained in the trust patent or provided by law. It does not appear that any of the cases we have examined has so construed this provision but the provision is broad enough so that it gives constructive notice imposed by law or by the provisions of the trust patent to persons who might become purchasers or would-be purchasers. It is the established principle of law that a fee patent can not convey **what the law reserves.**

If the foregoing provision in the fee patents issued to the Appellants may be so construed, then the United States was never a necessary or indispensable party to the action, but the other defendants named in the action are necessary parties and the action should not have been dismissed as against them.

If the foregoing statutes do not authorize an Indian to sue the United States and make it a party defendant in his own right, without first securing the consent of the United States, it has been held to exist by necessary implication under the facts surrounding the question before the Court. Implied authority to make the United States a party may be assumed in this action by reason of the fact that the fee patents

were forced upon the Appellants without their application or consent and contrary to express provisions of treaty of 1887, heretofore cited, and the express provisions of Section 348 of Title 25 U. S. C. A., heretofore cited, and section 177 of Title 25 U. S. C. A., heretofore cited and discussed. The Appellants were and are powerless to recover possession of their allotments unles they can prosecute this suit to a conclusion, and if the United States is an indispensable party then the treaty and allotment act already cited should be held to give the Appellants **implied** authority to make the United States a party defendant.

The only authority cited by the United States in support of its motion to dismiss was the case of the United States v. Eastman, supra. The Appellants do not believe that case applies here for the reason that in the Eastman case the United States sought an injunction against the tribe to keep members of the tribe from cutting and selling timber from tribal lands. The basis of the case of the Appellants is the question of having been excluded and deprived of the possession of their allotments promised and guaranteed to them by the United States.

If the Eastman case is authority against the Appellants in their endeavor to make the United States a party defendant, we believe it has been overruled by the more recent case of Lee Arenas et al v. United States, 60 F. Supp. 411, and the previous decision of the Supreme Court to which the case had been appealed on a former trial, it having been dismissed in

the trial court and that judgment affirmed by the Circuit Court of Appeals on first trial upon the theory that the United States could not be sued without its consent. Section 345 of Title 25 U. S. C. A. was held to apply and gave Arenas and his associates the right to maintain the action against the United States. The situation of the Appellants is very like that of Arenas when he first commenced the action and it was summarily dismissed on motion of the United States. In its final decision this court treated the Indian as **non sui juris** holding, in effect, that the Indian could not consent to his own detriment or contrary to the laws enacted for his own protection. Under the recent case of United States v. Hellard, 64 S. Ct. Rep. 985, 322 U. S. 365, the court seems to hold that consent of the United States may be implied under certain circumstances and cites the case of Minnesota v. United States, 305 U. S. 382, 59 S. Ct. Rep. 292, 83 L. Ed. 235, wherein it was held that an action brought involving restricted Indian lands, jurisdiction to sue the United States is conferred by implication. The Appellants believe that the courts should hold in favor of the Appellants maintaining the action, if authority is not expressly conferred, then by necessary implication so that the Appellants may have their day in court and have their claims of right of possession and ownership confirmed. Any other decision would amount to confiscation of the allotted lands granted to the plaintiff by the United States. It is virtually impossible for an individual Indian to get consent

of the United States to maintain a suit against it and to permit the defendants, other than the United States, to have the suit dismissed against them for the alleged reason that the United States is an indispensable party, would work the grossest injustice and hardship upon the Appellants. It would have the effect of depriving them of their property without due process of law upon a technical question in procedure and not upon any substantive right those defendants may claim or interpose.

The situation of the Blackfeet Indian in 1918, and since then, is very similar to the condition of the Palm Springs Indians, the history of which tribe has been ably discussed by the Supreme Court in the Arenas case, and cited finally in reviewing the case on appeal by this court of appeals, 158 F. 2d. 730; this court cites from the Supreme Court criticizing the Secretary of the Interior for his failure to approve the allotments. The Appellants, and more than 500 other Blackfeet fee patentees, had these patents forced upon them within a very short period of time after the trust patent was issued in 1918. Why this was done is somewhat of a mystery. Perhaps it will come out if the Appellants are allowed to prosecute this action and have the opportunity to bring out the facts and circumstances under which the fee patents were issued. The department letter, heretofore cited, dated April 24, 1918, lacks an explanation of why the fee patents were being forced upon the Blackfeet allottees and that fact was brought out in the Glacier Coun-

ty case. Just why the United States prosecuted the action against Glacier County and cancelled some 27 of those forced fee patents and why it has since failed to cancel other forced fee patents issued during the same period of time as were the patents in the Glacier County case, has never been explained. It was clearly the duty of the Secretary of the Interior, upon the decision of this court cancelling the fee patents in the Glacier County case, to have proceeded and cancelled all fee patents issued under those circumstances. If that had been done by the Secretary at that time this and similar cases would not now be before this court. It would appear that the Department of the Interior was dissatisfied with the court's holding in the Glacier County case, and has since then pursued the policy of **doing nothing.** And now when the Appellants seek to obtain the relief they are clearly entitled to under the decisions of this court, the United States comes in and moves for dismissal because it has not given its consent. No doubt the same forces that thwarted the Palm Springs Indians from receiving their allotments was active and controlling as to the Blackfeet as fee patents were thrust upon them about that time. The attempt of Congress to right the wrong by enacting Section 349 of Title 25 U. S. C. A. has been disapproved by this court. As stated by the court in the Arenas case the Palm Springs Indians were "unlettered people, unskilled in the use of language," *****. This applies emphatically to the Blackfeet Indians who have been kept in confusion and em-

barrassment ever since 1918. They have not known what to do or what action to take—they have made repeated demands upon their superintendent and upon the Department of the Interior for more than 20 years trying to right the wrong that was done them, and they have been pushed from pillar to post and, apparently, **designedly** kept in confusion. The United States which should protect its Wards, in this case, appears and contests their right to prosecute the action in their own behalf.

As To the Defendants Other Than the United States. The decision of the lower court dismissed the Appellants' complaint as to the defendants, other than the United States, on the ground that the United States was an indispensable party. Other grounds alleged in the said motions were not given any special consideration as it appeared to be the theory of the trial court that the grounds alleged in the various motions amounted to a challenge to the jurisdiction of the trial court. It appeared to be the theory of the trial court that the complaint was sufficient and that the Court had jurisdiction if the United States was not an indispensable party. The trial court took the position that the United States was an indispensable party and it could not be sued without its consent. It did not give any consideration to the provision in section 345 of Title 25 U. S. C. A. to the clause setting out the right of an Indian to maintain a suit where he claimed to have been unlawfully "denied" or "excluded" from any allotment or any parcel of land to

which he claimed to have been lawfully entitled by virtue of any act of Congress.

The complaint conforms to the allegations of other complaints filed by the United States involving the right of Blackfeet Indians on the Blackfeet Indian Reservation, and it contains all of the essential matters alleged in other actions heretofore disposed of by the trial court and particularly to the actions entitled:

U. S. v. Glacier County, supra;
U. S. v. Frisbee et al, 57 F. Supp. 299.

The trial court specifically pointed out in the former decision, 62 F. Supp. 28, dismissing the former action as to the sufficiency of the complaint as follows:

> "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition that it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state court."

The fact that the Appellants have lost possession of their land through tax deeds, foreclosure of a mortgage, or any voluntary conveyance, is not material for the reason that the rights of the Blackfeet Indians in their allotments have repeatedly been declared by this Court to be **vested rights** and sections 349, 352a, and 352b of Title 25 U. S. C. A. do not constitute a defense and it is not necessary to negative those pro-

visions by allegations in the complaint. This question was very fully considered in this court in the case of U. S. v. Glacier County and many citations supporting that view were pointed out in that decision; attention to the Indian, Alice Aubrey Martin Whistler, in Glacier County Case is for all purposes **identical with the situation of the Appellants.** The defendant, Glacier County, in that case emphasized the situation of this particular Indian pointing out that she had mortgaged her land, that she had given an oil and gas lease, that she had voluntarily paid taxes and that she had refused to ask for cancellation of the fee patent, but notwithstanding these admissions, this Court held that she was entitled to the same consideration as the other Indians involved in that action, based upon the theory that the fee patent was void and could not divest her of her vested rights under the trust patent. In commenting upon Mrs. Whistler in the Glacier County case, Judge Pray said in his decision:

> "The Whistler lands rest upon the same state of facts and the same vested right held by the court to exist in respect to the other Indians, and therefor the court does not believe it should be governed by the statute offered in defense." (Referring to section 349 Title 25 U. S. C. A.)

See decision at page 28 in Transcript of record in the Glacier County case.

The trial court seemed to consider the complaint of the Appellants as a **collateral** attack on the fee patents issued to the Appellants. The complaint does

not ask for the cancellation of the fee patent and it does not make any direct allegation other than that the fee patent was void if construed to deprive the Appellants of their treaty and statutory rights as set forth in the trust patent. If the fee patents were construed to be subject to the restrictions and vested rights given the Appellants in their trust patents, they could receive the relief they sought without cancelling the fee patent. We have pointed out the clause in the fee patent and hold that it is subject to such construction. But if not subject to such a construction subordinating its provisions to the vested rights contained in the trust patent, the situation would be no different for the reason that the cases are very numerous protecting Indian rights in allotted lands to which the Indians had been given fee patent. In those cases, the court held that the fee patents were subject to existing law and rights guaranteed to the Indian by treaty and statute. Both state and federal courts have long recognized the right of an Indian ward to prosecute civil actions in his own right. A well considered early case is that of Wau-pe-man-qua v. Aldrich, (Ind.) 28 F. 489, where the Indian was held to have a right to maintain an action to declare a tax deed void, which tax deed had been issued more than twenty years prior to the suit, on the ground that the land, to which a fee patent had issued, was restricted and exempt from taxation by reason of Indian treaties and federal statutes in force at and prior to the time of suit. Other cases to the same effect are:

Felix v. Yakum, 77 Wash. 519, 137 P. 1037;
Proctor v. Painter, 43 F. 2d 974.

In the latter case it was held that a patent in fee, where the reservation is not set out in the fee patent, does not convey what the law reserves. Appearing to be to the same effect are:

Adams v. Hoskins, 259 P. 136;
Miller v. Tidal Oil Co. (Olk.) 265 P. 648;
Grotkop v. Stukey (Okl. 1929) 282 P. 611.

In the case of the United States v. the City of Salamanka (D. C. N. Y. 1939) 27 F. Supp. 541, the defense raised the question of the right of the United States to sue in its own court to enforce its own obligations to the Indians and the court observed that even though **the Indian himself could bring the action,** the United States also had jurisdiction to maintain such action for the benefit of its Indian Ward.

This Court held that no right conferred on an Indian allottee can be arbitrarily abrogated or changed by statute, and the United States as trustee, can not liquidate the trust without the consent of the allottee.

U. S. v. Ferry Co. Wash., 24 F. Supp. 399;
Board of Commissioners of Jackson Co. Kan. v. U. S., 100 F. 2d. 929;
U. S. v. Glacier County, supra;
U. S. v. Spaeth (Minn) 24 F. Supp. 365;
Ytatahwah v. Rebock et al (Ia.) 105 F. 257;
Felix v. Patrick, 105 U. S. 317, 36 L. Ed. 719;
Laughton v. Nadeau (Kan.) 75 F. 789;

27 Am. Jur. 550, 565, 566—Title "Indians."
The Kansas Indians, 5 Wall 737.

It would appear that the granting of a fee patent to a restricted Indian does not change the character or status of the trust title.

Wau-pe-man-qua v. Aldrich, supra; and
The Kansas Indians, supra.

A deed of conveyance by an Indian under restriction to convey is of no effect,

Sec. 177 Title 25 U. S. C. A. and annotations to that section Nos. 9½ and 23;
Smythe v. Henry (C. C. N. C.) 41 F. 705;
Dawes v. Brady (Okl. 1925) 241 P. 147.

Persons dealing with Indians must take notice of public treaties and acts of Congress, and do not take land as bona fide purchasers, relieved from restrictions on alienation merely because no such restrictions appear in the patent. Laughton v. Nadeau, supra.

On the same subject American Jurisprudence states the rule as follows:

> " It has been ruled that restrictions on the right of an allottee to convey for a specified period do not deprive the title of the character of a fee simple estate, but are rather in the nature of conditions subsequent. It is well settled that a conveyance executed in violation of such a restriction is void and conveys no title whatever to the grantee. The restrictions are a matter of governmental policy, therefor, no rule of property will avail to defeat them.

27 Am. Jur. 566 (Sec. 39 and notes);
U. S. v. Sherburne Mercantile Co., 68 F. 2d. 155.

This Court is referred to the citations of authority in the cases heretofore cited, and especially those cases involving the forced fee patents issued to Blackfeet Indians. The authorities cited by this court in its decision in the United States v. Glacier County, supra, are equally applicable here and commended to the attention of the court without further citation. Where a conveyance of Indian land is prohibited or restricted, a conveyance by the Indian, voluntary or involuntary, can not be ratified and the conveyance made legal by subsequent legislative action. That question was considered by this Court in the Glacier County case and held to be the law. See also:

Tiger v. Western Inv. Co., (Okl.) 96 P. 602, 31 S. Ct. Rep. 578, 221 U. S. 286;
Felix v. Yakum, supra.

The Appellants have found no authority holding that an Indian Ward can not prosecute an action in all cases as against any person—except possibly the United States, in matters involving his right to an allotment where he is being denied or excluded from an allotment he claims to be entitled to. We believe that the trial court erred in dismissing the complaint as to the defendants, other than the United States, as they are the persons directly depriving and excluding the Appellants from their allotments. They are not considered innocent purchasers for value from a

Ward of the United States, and they are now seeking the protection of the United States contrary to the direct promise and obligation of the United States to protect its Ward Indians in and to lands allotted to them.

CONCLUSION

The Appellants submit that they are entitled to prosecute this action upon one or more of the theories heretofore advanced, summarized as follows:

1. As against all of the defendants including the United States;

2. (a) That the United States has expressly consented to the maintenance of this action by virtue of its treaty obligations and sections 345, 348 and 177 of Title 25 U. S. C. A.

(b) That if there is no express consent given by Congress on the part of the United States, then the United States may be made a party by necessary implication.

U. S. v. Hellard, supra;
Minnesota v. U. S., supra;
Heckman v. U. S. 32 S. Ct. 424.

3. That the lower court erred in dismissing plaintiffs complaint as against defendants other than the United States.

Respectfully submitted,

S. J. Rigney
Attorney for Appellants.

No. 11591

In the

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. T. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE,

Appellees,

BRIEF OF APPELLEES

G. S. Frary, Bessie L. Frary, W. H. Mercer
Gemma N. Mercer, Milton Mercer
and Carma Mercer.

H. C. Hall,
Edw. C. Alexander,
Great Falls, Montana,
Attorneys for Appellees.

Upon appeal from the District Court of the United States for the District of Montana.

Filed ....., 1947

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Edw. C. Alexander,
Great Falls, Montana,
Attorneys for Appellees.

Upon appeal from the District Court of the United States for the District of Montana.

JURISDICTION

The action now presented is a statutory action to determine adverse claims to the title to real property under the provisions of Sections 9479 and 9480, Revised Cases of Montana, 1935. So far as here applicable Section 9479 provides:

> "An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known or unknown, who claim or may claim any right, title, estate, or invest therein, or lien or incumbrances thereon, adverse to plaintiff's ownership, or any cloud upon plainfiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim, and quieting title to said real estate."

Section 9480 provides:

> "In any action brought under the preceding section, the plaintiff may join as defendants any or all persons, known or unknown, claiming, or who might claim, any right, title, estate or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible of dower, inchoate or accrued, and including the person or persons in possession if the plaintiff is not in possession. If the plaintiff shall desire to obtain a complete adjudication of the title to the real estate described in the complaint, he may name as defendants all known persons who assert or who might assert any claim as in this section above specified, and may join as defendants all persons unknown who might make any such claim, by adding in the caption of the complaint in such action

the words, 'and all other persons, unknown, claiming or who might claim any right, title, estate, or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.' "

See:

Slette v. Review Publ. Co.,
71 Mont. 518, 230 Pac. 580;

Aronow v. Anderson,
110 Mont. 484, 104 Pac. (2d) 2.

The land involved is located in Montana, and all parties, plaintiff and defendant, are resident therein. (R. pp. 3, 4). No diversity of citizenship is suggested in the complaint.

The only allegations of the complaint applicable to these appellees are found in paragraphs III and XI, and are as follows:

Paragraph III, (R. p. 4):

"That the defendants . . . W. H. Mercer and Gemma N. Mercer, his wife; Milton Mercer and Carma Mercer, his wife; G. S. Frary and Bessie L. Frary, his wife, are citizens of the United States and all reside at Browning, Montana, except G. S. Frary and Bessie L. Frary, who reside at Cut Bank, Montana . . . ."

Paragraph XI, (R. p. 12):

"The plaintiffs further allege that the defendants . . . W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, and each and all of them claim some right, title or interest in or to, or assert some claim, lien or demand upon the real property described in paragraph IV of this

> complaint superior to the title of each of these plaintiffs; that such claims and assertions of claim are void and of no legal force and effect and that the ownership of the plaintiffs . . . is superior to any right, title or interest claimed or that may be claimed by any of the said defendants or any lien, claim or demand whatsoever or the defendants in and to the same or any part thereof."

These allegations together with the allegations of ownership in plaintiffs appearing in paragraph VII, (R. p. 8), are the only allegations necessary to state a cause of action under section 9479, R. C. M. 1935, quoted supra.

> Slette v. Review Publ. Co.,
> 71 Mont. 518, 230 Pac. 580;
>
> Nadeau v. Texas Co.,
> 104 Mont. 558, 69 Pac. (2d) 586.

But such allegations do not disclose any Federal question sufficient to give either the United States District Court or this court jurisdiction.

These defendants are in no way connected by allegations in the complaint with the issuance of the fee patents, (Par. VI. R. pp. 7, 8) with the taxation of the land and its sale to W. R. McDonald, (Par. VIII, R. p. 10); or with any possible conveyances, transfer or mortgage that may have been made by plaintiffs, (Par. *IX*, R. pp. 10, 11).

Under such circumstances there is no jurisdiction in this court or the lower court as concerns these appellees.

> Taylor v. Anderson,
> 234 U. S. 74, 58 L. Ed. 1218;
>
> Boston & M. Consol. C. & S. M. Co. v. M. O. P. Co.,
> 188 U. S. 632, 47 L. Ed. 626;

Joy v. St. Louis,
201 U. S. 332, 50 L. Ed. 776;

Devine v. Los Angeles,
202 U. S. 313, 50 L. Ed., 1016.

STATEMENT OF THE CASE

As heretofore noted, the action filed by complainants is, so far as concerns these appellees, an action to determine adverse claims to real property under the provisions of section 9479, Revised Codes of Montana, 1935. From the complaint the following matters appear either by allegations of fact or the legal conclusion of the pleader:

Complainants are of Indian blood, members of the Blackfeet Tribe and wards of the United States. They were each allotted certain lands in Glacier County and on February 28, 1918 trust patents were issued to them for such lands pursuant to the treaty of 1887. The trust patents contained the provision that the lands should be held in trust for a period of 25 years, and that any conveyance made during the trust period should be absolutely null and void. The trust period was indefinitely extended on June 18, 1934 by the provisions of the Wheeler-Howard bill (48 Stat. 984).

On June 11th, 1918, fee patents to the lands in question were issued to complainants without their application or consent and in violation of the provisions of the trust patents, and in violation of the treaty of 1887 and the Allotment Act of February 11, 1887. By reason of the provisions of the trust patents and of the treaty of 1887 and the Allotment Act complainants became vested with certain rights in said lands preventing alien-

ation or taxation thereof, and that complainants are the owners of the lands here involved and entitled to the possessions thereof. After the fee patents were issued to complainants taxes were levied against the lands by Glacier County, Montana. Such taxes were allowed to become delinquent and the land was sold by Glacier County at tax sale and thereafter conveyed by the county to one W. R. McDonald. The fee patents were forced upon complainants by the Indian Bureau by representations that they must be accepted and that the lands must be rendered subject to taxation. Any conveyance of the lands by complainants was not approved and if any such transfer was made it was null and void. Under the provisions of the fee patents the lands remained inalienable and non-taxable. It is further alleged that these appellees claim some title or interest in the lands superior to the title of complainants, but that such claims are void and of no legal effect.

The following relief is requested:

(a) That it be adjudged that appellees have no interest in the lands;

(b) That it be determined that the fee patents were issued without the application or consent of complainants;

(c) That complainants be declared to be the owners of the lands;

(d) That the lands be adjudged to be inalienable and immune from taxation.

The complaint was filed September 20, 1945, (R. p. 14), more than 27 years after the issuance of the fee patents.

Appellees filed motions to dismiss the complaint, (R. pp. 15-18, 24). On February 8, 1947, the District Court rendered its decision and ordered the complaint dismissed. (R. pp. 26-34). On February 26, 1947, judgment of dismissal was entered. (R. pp. 35, 36). From the order and judgment of dismissal, this appeal is taken. (R. pp. 39, 40).

QUESTIONS PRESENTED

1. Neither this court nor the lower court has jurisdiction.

2. The complaint fails to state a claim upon which relief can be granted in favor of complainants, or either thereof, and against the appellees or any thereof, for the reason that:

(a) Complainants may not, in an action such as this, collaterally attack the fee patents covering the lands in question issued by the United States on June 11, 1918.

(b) After fee patents are issued by the United States the lands covered thereby are subject to transfer and taxation.

(c) The state statutes of limitation are applicable as against these complainants and preclude any recovery herein.

(d) There is no allegation in the complaint that plaintiffs have been in possession of the lands at any time since October 25, 1930.

(e) From the allegation of the complaint, it may be properly inferred that complainants have made a voluntary conveyance or mortgage of the lands

after issuance of fee patents. If so, they are now estopped to attack such patents or to claim an interest in the lands.

ARGUMENT

1. *Jurisdiction.*

The question of jurisdiction has been heretofore presented in this brief and need not be here repeated.

2. *This is a collateral attack.*

The attack made by complainants upon the fee patents issued to them in 1918 is a collateral attack and will not be permitted.

Chatterton v. Lukin,
116 Mont. 419, 154 Pac. (2d) 798,

(Certiorari denied by Supreme Court June 18, 1945);

Mouat v. Minn. M. & S. Co.,
68 Mont. 253, 217 Pac. 342;

Pittsmont Copper Co. v. Vanina,
71 Mont. 44, 227 Pac. 46;

Carter v. Thompson,
65 Fed. 329;

St. Louis S. & R. Co. v. Kemp,
104 U. S. 636, 26 L. Ed. 875;

United States v. Maxwell Land Co.,
121 U. S. 325, 30 L. Ed. 949;

De Guyer v. Banning,
167 U. S. 723, 42 L. Ed. 340.

3. *After issuance of fee patents the lands became subject to alienation and taxation.*

By specific statute, (24 Stat. 390, 34 Stat. 182, Title 25 U. S. C. A. Sec. 349), it is provided:

"That the Secretary of the Interior may, in his discretion, and he is authorized, wherever he shall

> be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrances, or taxation of said land shall be removed . . ."

See:

Larkin v. Paugh, 276 U. S. 431, 72 L. Ed. 640.

The issuance of the fee patents was, in effect, a finding of competency with respect to complainants.

United States v. Lane, 258 Fed. 520;

United States v. Debell, 227 Fed. 760.

If, as suggested in appellants' brief (pp. 22, 23), complainants do not desire that the fee patents be cancelled, then it is clear that, under the express provisions of the statute, they have no standing in court. Certainly the fee patents cannot be disregarded and the present action be considered as an action to obtain possession of a trust allotment. If such were the purpose and theory of the action then the ordinary law action of ejectment would lie and a court of equity would have no jurisdiction.

Davidson v. Calkins, 92 Fed. 230;

B. & M. Consol. C. & S. M. Co. v. M. O. P. Co., 188 U. S. 632, 47 L. Ed. 626.

Complainants cannot have a fee patent and remain immune from taxation. Neither can they base their possessory rights upon a trust patent which has been superseded by a fee patent.

4. *The state statutes of limitations preclude recovery herein.*

The action here was commenced more than 27 years after the issuance of the fee patents. Apparently com-

plainants have not been in possession of the lands since October, 1930. (R. p. 10; appellants' brief, p. 21).

By statute, (32 stat. 284, Title 25 U. S. C. A. Sec. 347), it is provided:

> "Limitations of actions for lands patented in severalty under treaties. In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians."

Section 9015 Revised Codes of Montana, 1935 provides:

> "No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action."

The above section applies to actions to quiet title and in ejectment.

> Thompson v. Chicago, M. & St. P. R. R. Co.,
> 78 Mont. 170, 253 Pac. 313;
>
> Kurth v. Le Jeune,
> 83 Mont. 100, 269 Pac. 408.

The state statute, therefore, bars recovery here.

Thlocco v. Magnolia Petroleum Co.,
141 Fed. (2d) 934;

Stewart v. Keys,
295 U. S. 403, 79 L. Ed. 1507;
42 C. J. S. p. 654, 655;

Foreman v. Marks,
117 Okla. 285, 246 Pac. 441;

Ward v. Love County,
253 U. S. 17, 64 L. Ed. 751.

5. *Complainants were not in possession of the lands when the action was commenced.*

"The rule is well settled in federal court that before an action, such as this, may be brought, it must be alleged that the complainants were in possession of the land at the time of the commencement of the action.

"In B. & M. Com. C. & S. M. Co. V. M. O. P. Co., 188 U. S. 632, 47 L. Ed. 626, the complaint alleged that complainant 'is the owner and entitled to possession of certain property therein described.' The court said:

> " 'It is also objected that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a federal court.'

"In Subirana v. Kramer, 17 Fed. (2d) 725, the complaint alleged that 'the complainants are the owners in fee of the following estate.' The court said:

> " 'Then again a bill quia timet, or to remove a cloud upon real estate, should allege not only that the plaintiffs are in possession, but that their title has been established by at least one successful trial at law. Boston, etc. Min. Co. v. Mont. Ore. Co., 188 U. S. 632, 641, 23 S. Ct. 434, 47 L. Ed. 626;

> Holland v. Challen, 110 U. S. 15, 20, 3 S. Ct. 495, 28 L. Ed. 52.' "

In complainants' complaint it is nowhere alleged that they are in possession or have been since 1930 in possession of the lands. Indeed, possession of appellees is admitted and asserted in appellants' brief. (Brief pp. 7, 8).

6. *Complainants have made voluntary transfers of the land and may not now claim title or right of possession.*

In paragraph IX of plaintiffs' complaint, (R. p. 11) it is alleged:

> ". . . that any conveyance or transfer made by the plaintiffs or either of them, by mortgage or otherwise, was never approved by the President of the United States, or by the Secretary of the Interior, or any official of the United States having authority to approve any contract or transfer of real property made by any member of the Blackfeet Tribe of Indians; that if any such transfer was made, the same was null and void under the agreements and statutes hereinbefore cited."

These allegations can mean but one thing—that a voluntary conveyance was made of the property after the issuance of the fee patents. That this is true is recognized in the appellants' brief. (Brief pp. 21, 25, 26).

By 44 Stat. 1247, (Title 25 U. S. C. A. Sec. 352a), it is provided:

> ". . . The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the orginal or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs:

> Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued."

This statute constitutes a recognition by Congress that a sale or encumbrance of the land after issuance of fee patent is the equivalent to an application for and a consent to the issuance of the fee patent.

See:

> Board of Comrs. Caddo Co. v. U. S.,
> 87 Fed. (2d) 55.

7. Conclusion.

It is apparent from a reading of appellants' complaint and brief that they are not at all certain as to the theory upon which they are proceeding. Much of the argument in appellants' brief is upon matters wholly outside the record. It appears to be assumed in appellants' brief that these appellees are in some manner and by some allegation connected with the tax title to the lands which came to W. R. McDonald. Such is not the case. It is purely a matter of conjecture why these appellees are parties to the action. Whether their claim of title is derived from McDonald or through mortgage or other voluntary conveyance by appellants or by adverse possession is a matter as to which we are left entirely in the dark. The action as to these appellees is purely and simply an action under the state statute to determine adverse claims of which the Federal Courts have no jurisdiction.

Although appellants disclaim any desire to cancel the fee patents, it is certain that if the fee patents are left outstanding appellants cannot prevail here in view of express statutory provisions. It is equally certain that appellants may not at this late date attack the fee patents which they have recognized by voluntary mortgage and conveyance of the lands described therein. Neither equity nor statute will permit an action such as is here presented.

It is assumed that other appellees will present argument upon other matters to the court in their briefs.

It is respectfully submitted that the judgment dismissing the complaint as to these appellees should be affirmed.

Respectfully submitted,
H. C. Hall,
Edw. C. Alexander,
Great Falls, Montana,
Attorneys for Appellees.

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Upon Appeal from the District Court of the United States for the District of Montana

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ARGUMENT

This brief will be confined to a discussion of the following points:

(1) The United States District Court of Montana did not have jurisdiction of the subject matter of the action.

(2) The United States was an indispensable party to the action.

(3) The United States has not consented to be sued in an action of this character.

(4) The allegations of the complaint were insufficient to show that the case was one falling within the provisions of Sections 352 (a) or 352 (b), Title 25, U. S. C. A., and the complaint therefore did not state a cause of action.

The above points will be discussed in the order stated.

I.

THE UNITED STATES DISTRICT COURT OF MONTANA DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

(a) The action cannot be maintained under subdivision 1 of Section 41, Title 28 U. S. C. A., because the complaint contains no allegation as to the amount or value of "the matter in controversy." (28 U. S. C. A., Sec. 41, (1). Even if we concede, for the purpose of argument, that the facts set forth in the complaint are sufficient to show that the claims of the plaintiffs are based upon "the Constitution or laws of the United States or treaties made, or which shall be made, under their authority," such fact is not sufficient to confer jurisdiction of the action upon the District Court, unless "the matter in controversy exceeds, exclusive

of interest and cost, the sum or value of $3,000.00." (Sec. 41 (1), Title 28 U. S. C. A.) And the allegation of sum or value of "the matter in controversy" is jurisdictional.

> See authorities cited in Paragraph 252 of Annotations to Section 41, 28 U. S. C. A.

(b) The action cannot be maintained under subdivision 24 of Section 41, Title 28 U. S. C. A., nor under Section 345, Title 25 U. S. C. A. These sections have reference to an action to obtain an "allotment of land under any law or treaty" for an Indian, and have reference only to actions to obtain the original allotment. The present action is not of that character. This question has been expressly decided by this Court.

U. S. vs. Eastman (C.C.A. 9th) 118 Fed. (2) 421.

Construing the above provisions of the statute, this Court said:

> "It is plain from the whole statute that Congress intended merely to authorize suit to compel the making of allotments in the first instant. Here the allotments have already been made."

U. S. vs. Eastman, 118 Fed. (2) 421.

Appellee respectfully submits that there is no provision of the statute giving the United States District Court jurisdiction of an action of this character, especially in the absence of any allegation that the amount or value of the matter in controversy exceeds $3,000.00.

II.

THE UNITED STATES WAS AN INDISPENSABLE PARTY TO THE ACTION

The basic purpose of the action appears to be to obtain an adjudication by this Court that the fee simple patents, issued by the United States to the respective plaintiffs during

the year 1920, or prior thereto, are void or voidable and that the rights of the various defendants in the action are invalid, because of the invalidity of the fee simple patents through which the rights of the defendants are derived. Any such adjudication would have the effect of annulling and cancelling the fee simple patents and reviving the trust patents issued to the plaintiffs in 1918. Such adjudication and annulment of the fee simple patents would have the further effect of adjudicating directly, or by necessary implications, that the United States had breached its duties as trustee for the respective plaintiffs when it issued the fee simple patents and also to re-impose upon the United States, the duties and obligations of a trustee, holding in trust the lands described in the complaint for the use and benefit of the respective plaintiffs. In any such action, the United States is a necessary and indispensable party.

The rule is stated in Moore's Federal Practice as follows:

> "One who holds the legal title, even if it is only the bare legal title, such as a trustee for security or in escrow, or an assignee for the benefit of creditors, is an indispensable party to a suit in which the legal title will be affected. A trustee under a mortgage is an indispensable party in a suit by the mortgagor to set aside a foreclosure. So also a trustee under a mortgage is indispensable in a suit by the bondholders to foreclose, unless his interest is adverse to that of the bondholders, in which case he is only a necessary party."

2 Moore's Federal Practice, pp. 2151-2152, citing:

Wilson v. Oswego Township, 151 U. S. 56; 14 S. Ct., 259, 38 L. Ed. 70.

Thayer v. Life Assn. of America, 112 U. S. 717, 5 S. Ct. 355, 28 L. Ed. 864.

The plaintiffs in this action are not claiming, apparently, that they hold the legal titles to the lands described in the complaint, by virtue of the fee simple patents issued to them during 1920, or prior thereto. On the contrary, it is alleged in the complaint that the plaintiffs **"were and are** the owners of allotments on the Blackfeet Indian Reserva-

tion," etc. (Paragraph I of the Complaint). If the Court upholds this allegation of the complaint, the Court necessarily determines that the United States is the holder of the legal title and that it owes to these plaintiffs, and each of them, the duties and obligations of a trustee of an express trust. It seems clear that such duties and obligations of a trustee of an express trust. It seems clear that such duties and obligations cannot be imposed upon the United States by judgment entered in any action, to which the United States is not a party. It is equally clear that, unless the Court determines that the fee simple patents are void, no relief of any character can be awarded to the plaintiffs, or any of them. Certainly the United States cannot be bound by a judgment entered in a case, to which it is not a party, and if the Court should enter a judgment herein that the fee title patents are void and that the trust allotments are still in force and effect, or new trust patents should be issued, the judgment could be entirely ignored, at least by the United States, unless it is made a party to the suit.

U. S. v. Hellard, 64 S. Ct. 965, 88 L. Ed. 1326. 322 U. S. 363.

The Hellard case involved an action partitioning restricted Indian land. The United States had not been made a party to the partition suit. In a subsequent action brought by the purchaser at the partition sale to quiet his title, the United States, alleging that the partition proceedings were void "for lack of the United States as a party," appeared in the action, removed it to the Federal Court and nullified the partitioning judgment. In the course of its opinion, the Supreme Court said:

> "Restricted Indian land is property in which the United States has an interest."

If the United States has an interest in restricted Indian property, the legal title to which is vested in the Indian, then, for much stronger reasons, it must be said that the United States has an interest in trust patented land, the legal title to which is vested in the United States. The Hellard case clearly implies that no action may be maintained between third parties, affecting the title or right

of possession of either restricted Indian land or allotted land, to which the United States is not made a party, either plaintiff or defendant.

The objection that an indispensable party is not before the Court, may be raised at any stage of the proceedings, but it is properly raised at the earliest convenient stage.

2 Moore's Fed. Practice, page 2190;

Brown vs. Christman, 126 Fed. (2) 625;

Neher vs. Harwood, 128 Fed. (2) 846.

If the plaintiffs are unwilling or unable to bring an indispensable party within the jurisdiction of the Court, the action should be dismissed.

2 Moore's Fed. Practice, page 2190.

Hoover Co. v. Coe, Commissioner, 144 Fed. (2) 514;

Line Material Co. v. Coe, Commissioner, 144 Fed. (2) 518;

See also: New Mexico v. Lane, 243 U. S. 52; 61 L. Ed. 588, 37 S. Ct. 348.

The United States, which issued the fee simple patents, the validity or invalidity of which constitute the principal issue of law and fact in this case, is entitled to be heard upon this issue, before the patents are declared null and void. The United States is, therefore, interested in the action and an indispensable party thereto for two reasons:

(a) According to the claims of the plaintiffs, the United States holds the legal title to the property in question and owes to plaintiffs the duties of a trustee of an express trust, and any judgment rendered herein, granting the plaintiffs any relief whatsoever, would necessarily impose upon the United States, the duties and obligations of a trustee, notwithstanding the fact that the alleged trustee, through one of its departments, took action to terminate the trust by the issuance of fee simple patents; and

(b) The United States is interested in the action as a party to the contracts, i. e.: the fee simple patents—the

validity of which constitutes the principal issue in this case.

The District Court, in its decision rendered in Case No. 525, after a careful review of the authorities, held that the United States was an indispensable party to the action.

Rose Gerard et al vs. W. H. Mercer, et al., 62 Fed. Supp. 28

It is settled law that the United States cannot be sued without its consent.

U. S. ex rel Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191

It is equally well established that if an indispensable party is not within the jurisdiction of the Court, the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068

Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411

Mines Safety Appliances Co. v. Knox, Sec'y., 59 F. Supp. 733

See also: First National Bank of Holdenville vs. Ickes, 154 Fed. (2) 851.

We respectfully submit that Appellees' motion to dismiss was properly granted and the action was properly dismissed by the District Court.

III.

THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN AN ACTION OF THIS CHARACTER.

Nowhere in the statute is there any provision indicating that the United States has consented to be sued in an

action, the purpose of which is to annul the fee simple patent issued by the United States and to impose upon the United States the responsibility and duties of a trustee.

The only suggestion to the contrary made by Appellants is the provisions contained in subdivision 24 of Section 41, Title 28 U. S. C. A., and corresponding provisions in Section 345 of Title 25 U. S. C. A. But as heretofore decided by this Court, these sections have reference only to actions to compel the original allotment.

U. S. vs. Eastman, (C. C. A. 9th) 118 Fed. (2) 421.

Counsel for Appellants fails to point to any other provisions of the statute, which could possibly be construed as a consent to be sued by the United States. It is elementary law that the sovereign can be sued only by its consent.

Since the soverign has not consented to be sued by a private party in a case of this character and the action cannot proceed without the United States being made a party thereto, it follows that the action must be dismissed. Appellees' motion to dismiss upon this ground was properly granted.

IV.

THE ALLEGATIONS OF THE COMPLAINT WERE INSUFFICIENT TO SHOW THAT THE CASE WAS ONE FALLING WITHIN THE PROVISIONS OF SECTION 352 (a) OR 352 (b), TITLE 25, U. S. C. A., AND THE COMPLAINT THEREFORE DID NOT STATE A CAUSE OF ACTION.

The intent of Congress in enacting Sections 352 (a) and 352 (b), Title 25 U. S. C. A., is clearly indicated in the reports of the committee which recommended these bills for

passage and clearly shows that the execution of a mortgage upon the land or a conveyance of the land by the Indian grantee subsequent to the issuance of fee simple patent, is an implied consent to the issuance of fee simple and approval thereof.

Section 352 (a), 25 U. S. C., was enacted February 26, 1927 (25 U. S. C. A., Sec. 352 (a). It provided expressly that the relief therein provided was limited to cases where "the patentee has not mortgaged or sold any part of the land described in such patent."

25 U. S. C. A., Sec. 352 (a).

In the report of the Committee on Indian Affairs (Report No. 1896) filed in the House of Representatives and recommending passage of the Bill, the interpretation of the law is indicated in the following provisions of the report, to-wit:

> "Placing a voluntary encumbrance upon or disposing of lands so patented, must in law be considered as an acceptance of the fee patent and as a waiver of the tax exempt provisions of a trust patent, but where forced patent land has neither been encumbered nor sold by the patentee, such patent ought to be cancelled on application made to the Secretary of the Interior."
>
> (Report No. 1896 from Committee on Indian Affairs filed in House January 29, 1927)

This report was adopted by Congress and indicates the Congressional intention in enacting the provision.

Section 352 (b), 25 U.S.C.A., was enacted February 21, 1931. The intention of Congress, in enacting this latter provision, is clearly indicated by the report of the Congressional Committee which handled the Bill. Under date February 12, 1931, the Committee on Indian Affairs in the Senate reported the Bill for passage and in its report, expressed its interpretation of the Bill as follows:

> "It will be observed by the terms of the amendment, no title will be effected until the Secretary of the Interior has taken affirmative action by cancelling the illegally issued patent in fee, and in lieu thereof substituted a trust patent, and that when this has been done, the lands will have the same status as they would

have had if no patent in fee had ever been issued*****

"Under the law as it existed at the time the fee simple patents complained of were issued, it has been held by the courts that the Indians have vested right in the tax free status of their allotments during the trust periods fixed by law, and that such rights cannot be taken from them without their consent by the device of a forced patent.

* * * * *

Placing a voluntary encumbrance up, or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax exempt provisions of a trust patent, but where forced patent has neither been encumbered nor sold by the patentee, such patent ought to be cancelled on application made to the Secretary of the Interior*****."

"Taxes or even tax deeds cannot be said to be encumbrances of a character to prevent cancellation as these impositions are not voluntary * * * * * This committee was of the opinion that where land covered by such illegally issued patent had been either mortgaged or sold by the Indian to whom the patent was issued **that such mortgage or sale, as the case might be, would amount to an acceptance of the patent and that he could not be heard to say that such patent had been improperly issued."**

(Report No. 1595 from Committee on Indian Affairs filed in the Senate February 12, 1931, recommending passage of Act now Sec. 352 (b), Title 25 U. S. C. A.)

The same views had been expressed by the House Committee on Indian Affairs, which reported the Bill (HR 15267) to the House of Representatives (Report No. 2269 from Committee on Indian Affairs to HR 15267, filed in House January 14, 1931).

The views expressed by the respective Committees on Indian Affairs of the House and Senate, in reporting for passage the Acts now Sections 352 (a) and 352 (b) of Title 25 U. S. C. A., are in harmony with the general rule that acceptance of a deed or patent may be manifested by the fact that the grantee mortgaged or conveyed the property or a portion of same. The rule is states in Corpus Juris Secundum as follows:

"So there may be an acceptance by the retention of the deed by the grantee; by an assertion of title by him; by his conveyance or mortgage of the property; by acts of ownership generally in respect to the property."

26 C.J.S., p. 255

See also:

Lyon vs. Lyon (Cal. App.), 233 Pac. 988

Bradley v. Bradley, 171 N. W. 729, 185 Iowa 1272

Clark v. Skinner, 70 S. W. (2d) 1094, 334 Mo. 1190.

The rule is stated in American Jurisprudence as follows:

"In the determination of whether there has been an acceptance of a deed on the grantee's part, the inquiry is as to his intention as manifested by his words and acts. Express words and positive acts are not necessary; intention to accept may be inferred from such conduct as retaining possession of the deed, conveying or mortgaging the property, or otherwise exercising the rights of an owner."

16 American Jr., p. 525, Sec. 154, and cases cited.

The Montana statute provides that a contract may be ratified by subsequent consent:

"A contract which is voidable only for want of due consent may be ratified by a subsequent consent."

Sec. 7496 R.C.M. 1935

And the voluntary acceptance of a benefit of a transaction is equivalent to a consent to same.

Sec. 7497 R.C.M. 1935

The reports of the Congressional Committees which handled the Bills for the enactment of Sections 352 (a) and 352 (b), Title 25 U. S. C. A., show clearly the intention of Congress in enacting these provisions and also the Congressional understanding and interpretation of the previous law. These reports may be properly resorted to by the Court for the purpose of ascertaining the Congressional intent in en-

acting the law if there is otherwise any doubt about such intent.

59 C.J., p. 1021.

The excerpts from the Committee reports above quoted, leave no doubt as to the Congressional purpose and intent in enacting Sections 352 (a) and 352 (b), Title 25 U. S. C. A.

These Appellees respectfully submit that in all cases where the Indian grantee has mortgaged the land or conveyed the land or any portion thereof, he has by such act consented to the issuance of the fee simple patent to him, because otherwise he would not be in a position to mortgage or sell the property and obtain the proceeds from such transaction.

There are no allegations in the complaint herein to indicate that the case falls within the provisions of Sections 352 (a) or 352 (b), Title 25 U. S. C. A. Under the circumstances, the complaint does not state a cause of action and the District Court was correct in granting Appellees' motion to dismiss.

There are many other points involved in the case that ought to be discussed; but a discussion of same would unduly extend this brief. We believe that the points above set forth are sufficient to fully justify the dismissal of the action and that the judgment of the District Court should be affirmed.

WILBUR P. WERNER
LOUIS P. DONOVAN

Attorneys for Appellees Fred Shupe and Guy McConaha

APPENDIX

"Cancellation of patents in fee simple for allotments held in trust. The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefore by the allottee or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued. (Feb. 26, 1929, c. 215, 44 Stat. 1247.)"

25 U. S. C. A., Sec. 352 (a)

"Same; partial cancellation; issuance of new trust patents. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by morgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents have never been issued: Provided, That this section and section 352a of this title shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired. (Feb. 26, 1927, c. 215, Sec. 2, as added Feb. 21, 1931, c. 271, 46 Stat. 1205.)"

25 U. S. C. A., Sec. 352 (b)

No. 11591

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE,

Appellees

BRIEF OF RESPONDENTS
J. L. SHERBURNE and EULA SHERBURNE

Murriils and Frisbee
Cut Bank, Montana
Attorneys for Respondents

Upon Appeal From the District Court of the United States for the District of Montana

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Filed ----------

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SUBJECT INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

FEDERAL STATUTES AND TREATIES

STATEMENT OF THE CASE

The complaint alleges that allotments were made and trust patents issued to each of the appellants, in the usual form, pursuant to an agreement of 1887 and the General allotment act of 1887;

That the trust period was indefinitely extended by the Wheeler-Howard act, in 1934, Paragraphs I to V.

In paragraph VI, appellants allege that fee patents were issued in direct violation of the Agreement of 1887, and the general allotment act of 1887, and the trust clause of the restricted patent without the application or consent of the plaintiffs. The same paragraph contains the following significant allegation:

> "That by reason of the agreement of 1887 heretofore cited and the General Allotment Act of 1887, plaintiffs acquired a vested right of which they could not be deprived, directly or indirectly, by their own voluntary acts or by operation of law, whether by tax deed, voluntary conveyance or otherwise."

Paragraph VII of the complaint contains the following allegation:

> "That the right of restriction on alienation was and is vested right that could not be divested by subsequent act of Congress or by issuance of a fee simple patent which did not contain notice of the restriction on alienation provisions of the Agreement of 1887, and the General Allotment Act of February 8, 1887, both of which are cited herein."

Paragraph VIII alleges that tax deeds were issued to both allotments by Glacier County and that the County conveyed after sale of the tax title to W. R.

McDonald; that the taxes and tax deed are null and void and the land immune to taxation.

The complaint alleges in Paragraph IX that the Secretary of the Interior never made any finding that the appellants were competent to receive a fee patent, and that any voluntary conveyances of the land by the appellants are null and void because made without the approval of the president of the United States, or the Secretary of the Interior, and in violation of the restriction on alienation.

Paragraph X of the complant alleges the novel theory that the familiar habendum clause of the fee patent preserves the restrictions upon taxation and alienation contained in the trust or restricted patent.

Paragraph VII alleges that the plaintiffs are the owners of the land; paragraph XI alleges that the United States may lawfully claim an interest in the lands as guardian of the plaintiffs. Paragraph XI also alleges that the other defendants claim an interest in the land without right.

The Prayer of the Complaint prays for judgment of the court that, the defendants save the United States have no interest; that the fee patents were issued without application or consent; that the lands are inalienable and immune from taxation; and that the plaintiffs are the owners of the lands subject to the guardianship of the United States.

Defendants moved to dismiss the complaint, upon the grounds that no cause of action was stated, that the United States was not subject to suit, and was an indispensable party, and that there was a misjoinder of cause of action. The court dismissed

the action without ruling upon the question of misjoinder of actions.

ARGUMENT

The theory of this brief is first, that the complaint does not state a cause of action, second, that this action is an attack upon a fee simple patent issued by the United States and such an action can only be maintained by the United States as plaintiff, and can not be prosecuted by any person or citizen in his own right, the United States is an indispensable party to this action, and it has not consented to be sued.

I.

The complaint does not state a cause of action, because it admits that the plaintiffs have made voluntary conveyances of their lands, after the fee simple patents were issued, and does not allege sufficient facts to establish that the fee simple patents were issued contrary to law or are null and void for any other reason.

The complaint alleges that tax deeds upon both allotments were issued to Glacier County, and that the County sold the tax title lands to W. R. McDonald. The Statement of the case by plaintiffs contains the same thing. It is true that the complaint mentions voluntary conveyances by the plaintiffs, however, the appellants brief says very little about the voluntary conveyances, but a great deal about the tax deeds. The brief of appellants must be designed to infer that the defendants claim title under the tax deed and that the plaintiffs have been divest-

ed of their title and possession by virtue of the tax deed. The voluntary conveyances are nowhere described or explained.

The allegations that tax deeds were issued for both allotments is not true. Glacier County assigned the tax sale certificates for the Fred Gerard allotment to W. R. McDonald, and a tax deed was issued to McDonald. The taxes were paid upon the Rose Gerard allotment and no tax deed was ever issued against that land.

Plaintiffs lost both allotments by foreclosure of a mortgage made to one Noel. Partial assignments of the sheriff's certificate of sale were made so that the Sheriff's deed to the Fred Gerard allotment was issued to defendant . L. Sherburne, and for the Rose Gerard allotment to the defendant, G. S. Frary.

The Fred Gerard allotment is upland grazing land with no water upon it. The Rose Gerard allotment is located upon the Middle Fork of Milk River a mile or so north of Fred Gerard's allotment. The family made no attempt to save Fred Gerard's allotment. Defendants, Guy McConaha and Fred Shupe, succeeded to both the tax title and mortgage foreclosure titles of the Fred Gerard allotment.

The buildings are located upon the Rose Gerard allotment. A daughter of the plaintiffs, Mary Gerard Allison, purchased her mother's allotment from G. S. Frary and gave a mortgage for the consideration. She defaulted and Frary foreclosed and the land was sold a second time by the sheriff. Mary Gerard Allison redeemed, and subsequently sold the

land to Earl Johnson who in turn sold the land to defendants W. H. and Milton Mercer.

The action is based upon the decisions of this court in United States vs. Glacier County, 99 Fed. 2nd 733; United States vs. Benewah County 290 Fed. 628; United States vs. Lewis County, Idaho, 95 Fed. 2nd 232; and United States vs. Nez Perce County 95 Fed. 2nd 237.

If the question of voluntary conveyances is lost sight of, it will appear that this action is exactly like the above actions except for the difference in the party plaintiff and the situation of the United States. The plaintiffs clearly rely upon these citations to establish that the tax deeds are void, but since they lost title to both allotments by voluntary conveyance as well as by ax deed upon one allotment, it must be true that the plaintiffs rely upon the cited decisions of this court to establish not only that the ax deed is void, but that their voluntary conveyances are void. A mortgage is of course a voluntary conveyance, and a subsequent foreclosure does not make it involuntary.

The complaint alleges that the fee simple patents were issued without application or consent by the appellants. If these allegations are true and are established as questions of fact, there is little question that the tax deed is void, under the above cited decisions of this court, and Choate vs. Trapp, 224 U. S. 665; 32 S. Ct. 565, 56 L. Ed. 941.

However, we think the complaint wholly fails to state any cause of action for cancellation of the voluntary deeds and mortgages made by the appellants.

The Benewah County decision and the subsequent decisions of this court all were actions to vacate tax deeds; no question of cancellation of voluntary conveyances made by Indians was involved. The counsel for appellants is proceeding upon the theory that if a fee simple patent is null and void if issued without the application or consent of the Indian, then the subsequent deeds and mortgages by the Indian are likewise null and void.

It is true that counsel argues that the habendum clause of the fee patent preserves the restrictions against taxation and alienation found in the trust patent, but this argument is only an alternative one and is not his principal theory. The argument that the habendum clause of the fee patent preserves the restrictions contained in the trust patent because otherwise, it must be issued in violation of law (see pages 15 and 16 of appellants brief) is to puerile to deserve serious consideration.

The fee simple patent did not convey any right, title or interest upon the appellants that they did not already possess, under the trust patents, except the freedom to alienate. Appellants were the beneficial and actual owners of the land under the trust patents; the only new right conferred by the fee patents was the right to alienate. If the fee simple patent does not terminate the restriction against alienation, then it does not have any legal significance or effect at all.

The appellants can not prevail in a trial upon the merits in this action, unless they can vacate not only the tax deed upon Fred Gerard's allotment, but the voluntary deeds and mortgages made by both appel-

lants as well. This necessity is the significance of the statement at page 14 of the brief, that the restriction upon alienation is a vested right, running with the land, of which the appellants can not be deprived.

The proposition that restriction against taxation is a vested right of which an Indian can not be deprived without his application or consent is so well established, that it is no longer open to debate. We know of no decision of any court which refers to the restriction against alienation as a vested right; neither do we know of any court decision which refers to the right to alienate, once granted, as a vested right. None the less, Counsel for appellant following his own brand of logic has taken the language of this court that restriction against taxation is a vested right in the Benewah County case, and developed the conclusion that the restriction against alienation is also a vested right and that voluntary deeds and mortgages are contrary to law and just as null and void as taxes and tax deeds.

We do not know of any court decision where the validity of voluntary conveyances by Indians has been questioned upon the ground that the fee simple patent was issued without the application or consent of the Indian. Counsel for appellant has not referred to any in his brief save, United States vs. Glacier County, supra.

United States vs. Glacier County was file No. 8734 in this court. Reference to the printed transcript for that appeal, page 21, shows that the defendant, Glacier County, alleged in its answer that one Indian, namely Alice Aubrey Martin Whister,

had made a mortgage and an oil and gas lease on her allotment, after the fee patent was issued, Paragraph XIII part 2 of answer. The United States moved to strike such allegation, and the trial court granted the motion, see pages 23, 24 and 83 of transcript 8734.

At the trial of U. S. vs. Glacier County the attorneys for the United States and for the county stipulated that all of the 28 fee simple patents involved in the action had been issued to the respective Indian allottees, without their application or consent, see page 62 of that transcript.

The counsel for appellants says at page 22 of his brief, that the trial Judge, (Judge Pray) said in his opinion that the Whister lands rested upon the same state of facts and same vested rights as were found to exist in respect to the other lands. Judge Pray did make such a remark, see page 28 of the Glacier County transcript.

However, this court in its opinion did not make any such remark. This court based its decision upon the stipulation that the patents were issued without application or consent by the Indians. In the face of the stipulation there was no reason for the court to consider whether the mortgage and oil and gas lease made by Alice Aubrey Martin Whistler was or was not evidence of consent that the patent was issued with her consent; neither was there any reason for Judge Pray to consider that the Whistler lands would be treated any differently than the rest.

The owners of the mortgage and oil and gas lease made by Mrs. Whister were not parties defendant in the action and both mortgage and lease had prob-

ably expired when the action was commenced against Glacier County. The only defendants who contested the former action were Glacier County and its assessor and treasurer. The parties interested in the mortgage and oil lease were not before the court. The appearing defendants stipulated that the patent was issued without the application or consent of Mrs. Whistler. Glacier County was not concerned about the validity of the mortgage or oil lease or even the fee patent, but only about the taxes and tax deeds. All except Mrs. Whistler's patent were cancelled by order of the Secretary of the Interior.

We therefore, submit, that United States vs. Glacier County is not authority for the proposition advanced by appellant's counsel, namely that, if a fee patent be issued without application or consent by an Indian, that the Indian's subsequent voluntary deeds and mortgages are null and void. No such proposition has ever been decided by any court. The present action is not exactly like the Glacier County case, as opposing counsel would have the court believe, because it involves questions about the validity of voluntary conveyances by Indians which were not adjudicated in that decision.

Counsel for appellants has based its appeal upon his theory that the restrictions against taxation and alienation are both vested rights of which the Indian allottee can not be deprived without his consent. The Counsel treats both restrictions as though they were one and the same thing, when in fact the two restrictions are very different. The restriction

against taxation can continue to exist long after the restriction against alienation has been removed. The Supreme Court so held in the leading case of Choate vs. Trapp, supra.

> "But the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for sixteen years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary, the privilege of nontaxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians (Blue Jacket vs. Johnson County) 5 Wall. 737 (1), 756, 18 L. ed. 667, 672; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478." Choate vs. Trapp, 32 S. Ct. 568.

Choate vs. Trapp held that the removal of restrictions against alienation in the case of the Okla-

homa Indians was valid, but that the restrictions against taxation was not thereby removed so long as the Indians held the land. If the fee simple patents were issued to the plaintiffs without their application or consent, they could have held their land for twenty-five years, immune from taxation. However, they did not hold it and have admitted that they made voluntary alienations.

The restrictions against taxation can not be removed without the application or consent of the Indian but it is otherwise with the restriction against alienation. We have pointed out that no court has treated the restriction against or the freedom to alienate as a vested right in any decision so far made. However, the Supreme Court of the United States has several times held that the restrictions against alienation can be removed by Congress with or without the consent of the Indians; the conclusion follows therefore, that the restriction against alienation is not a vested right. The application or consent of the plaintiffs with respect to the issue of the fee simple patent has nothing whatever to do with the validity of the voluntary alienations made by the plaintiffs. It is absurd to argue that the consent of the plaintiffs was necessary in order to make a valid alienation of their lands, for such consent was given when they made the alienation. The consent that is necessary to alienation of allotted lands by Indians is the consent of the Congress of the United States. The Act of Congress, 25 U. S. C. A. 349, which authorized the issuance of the fee patent, and the subsequent issuance of the same by the proper officers of the United States, was all the consent that

was necessary for the plaintiffs to alienate their lands.

The decisions of the Supreme Court to the effect that restrictions against alienation can be removed without the application or consent of the Indians are:

Choate vs. Trapp, supra,

Williams vs. ohnson,
239 U. S. 414, 420, 36 S. Ct. 150,
60 L. ed. 358

Egan vs. McDonald,
246 U. S. 227, 229, 38 S. Ct. 223,
63 L. ed. 680

Jones vs. Prairie Oil & Gas Company,
273 U. S. 195, 47 S. Ct. 338,
71 L. Ed. 602,

Fink vs. County Commissioners,
248 U. S. 399, 404, 39 S. Ct. 128,
63 L. Ed. 324,

Mahnomen County, Minnesota vs. United States, 319 U. S. 474, 63 S. Ct. 1254,
87 L. Ed. 1527

When the fee simple patents were issued the restriction against the alienation of the land and the trust period were both terminated. The obligation of the United States to convey the land free of incumbrance was satisfied, except to prevent levy of taxes while the immunity from taxation still existed. The plaintiffs were free to alienate their lands and having done so, they can not now be heard to say that they have been deprived of their vested rights.

The plaintiffs have admitted that they made vol-

untary alienations of their allotted lands. The complaint fails to allege sufficient facts, which if true would establish that the voluntary conveyances are void. Therefore the complaint does not state a cause of action.

II.

This Action Is An Attempt To Attack, Cancel And Annul A Fee Simple Patent. Such An Action Can Not Be Maintained Except By The United States As A Party Plaintiff.

The Trial Court held that this action was a direct attack upon the fee simple patents issued to the plaintiffs. We think the trial court was right. The complaint alleges that the fee simple patents are void, because both were issued without the application or consent of the plaintiffs. The prayer of the complaint asks that the court find and adjudge that the patents were issued without application or consent of the plaintiffs, and that the lands are inalienable and immune from taxation. The counsel for appellants at pages 22 and 23 of the brief, says that the action is not an attack upon the fee patents, and that the complaint does not ask for cancellation of the fee patents. We think the prayer of the complaint that it be determined and adjudged that the fee simple patents were issued without application or consent, that the lands are inalienable and immune from taxation is exactly the same thing as a prayer for cancellation of the fee simple patents. If the lands are not alienable, then the fee simple patents are certainly annulled.

Neither of these plaintiffs have any authority to maintain an action in their own names for the purpose of canceling a fee simple patent issued by the

United States. Such an action must be prosecuted by and in the name of the United States as plaintiff, and the suit must be under the direction and control of the Attorney General of the United States. Private persons may not prosecute such actions by making the United States a party defendant. Steel vs. St. Louis Smelting & Refining Co. 106 U. S. 447; 27 L. Ed. 226; 1 S. Ct. 389; Moat vs. Minneapolis Mining and Smelting Co. 68 Mont. 253, 217 Pac. 342; U. S. vs. Throckmorten 98 U. S. 61; 25 L. Ed. 93, 50 C. J. 1114, Section 518.

> "A suit to cancel a patent must be brought by the United States, and unless by virtue of an act of congress, no one but the attorney-general, or someone authorized to use his name, can initiate the proceeding." 50 C. J. 1114.
>
> "We are of the opinion that, unless by virtue of an Act of Congress, no one but the Attorney General, or someone authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts in which such a patent is founded."
>
> "In the class of cases to which this belongs, however, the practice of the English courts and of the American courts also has been to require the name of the Attorney General, as indorsing the suit, before it will be entertained. The reason of this is obvious, namely: that in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceed-

> ing is not well founded, or is oppressive, he may dismiss the bill." U. S. vs. Throckmorten, 25 L. Ed. 96.

Appellant's counsel has devoted much space to an attempt to prove that the appellants have a right to sue the United States for the purpose of attacking the fee simple patents. Such authorities have nothing to do with the issue of this appeal at all. Appellants can not attack a fee simple patent by joining the United States as a party defendant; the United States must be the party plaintiff.

III.

The United States Has Not Consented To Be Made A Party Defendant In This Action; And Is An Indispensable Party.

Even if the United States is properly a defendant rather than a plaintiff in this action, the suit must fail because the United States has not consented to be sued. This action is one to cancel and annul a fee simple patent issued by the United States government, and therefore the United States is an indispensable party.

The counsel for appellants admits that he commenced a similar action upon behalf of these same plaintiffs as well as other persons, and that the district court dismissed that action before this one was commenced. The decision is reported in 62 Fed. Supp. 28. The United States was not made a party, either Plaintiff or Defendant, in that action. If the counsel was really serious about his argument that the United States is not an indispensable party to this action, then why did he not appeal from the decision in the first action.

The appellants made the United States a party defendant in this action, and now therefore, they should not be heard to say that the United States is not an indispensable party. Appellants acquiesced in the former decision of the district court.

The appellants contend that consent to sue the United States has been granted by act of congress, to-wit 25 U. S. C. A. 345. We think counsel has misconstrued the statute.

This court has held that section 345 has no application to any kind of actions except actions to compel officers of the United States to make an allotment and to issue trust patents in the first instance. U. S. vs. Eastman 118 F. 2nd 421; cert. denied 314 U. S. 635, 86 L. Ed. 510, 62 S. Ct. 68.

> "The trial court thought that leave to sue the United States is found in the act of August 15, 1894, as amended, 25 U.S.C.A. s 345. We are not able to agree. It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed." 118 Fed. 2nd 423.

The Supreme Court of the United States held that the statute authorized suits by the Mission Indians of the Palm Springs Reservation in California

to maintain a suit by Indians against the United States to compel the Secretary of the Interior to issue a trust patent to an Indian. Arenas vs. U. S. 322 U. S. 419; 64 S. Ct. 1090. Further proceedings in the same action again came before the courts in Arenas vs. U. S. 60 Fed. Sup. 411 and 158 Fed. 2nd 730.

The appellants claim that the Arenas decision overrules the Eastman decision, (Their brief page 16). We think that the two decisions are entirely consistent, and that they can be readily distinguished.

In the Eastman case the Indians sought to enjoin the Secretary of the Interior from enforcing his regulations pertaining to the sale and cutting of timber growing upon the restricted allotted lands of the Indians. The court held that the Allotments had been made to the Indians, that they were not being excluded from the allotments and that the statute in question did not apply.

In the Arenas case, the Secretary had made an allotment, and his subordinate had issued the Indian a certificate. The Indian had been in actual possession of the disputed land for many years and had made improvements worth $15,000. The Supreme Court held that the Statute gave consent to maintain the action against the United States to prove whether or not the Indian was entitled to have a trust patent issued to him.

The appellants contend that section 345 grants permission to sue the United States in either of two situations, first when the Indians have been refused an allotment and second when the Indians have

been excluded from their allotments, and they base their claim on the language of the statute pertaining to exclusion from allotments. The complaint admits that the allotments were made to the appellants and that trust patents were issued to them. The brief admits that the United States and its officers have not and are not excluding the appellants from the lands in question. The brief says that the defendants other than the United States are excluding the appellants from the land. If the United States and its officers have not excluded the appellants from the land, wherein is there any cause of action against the United States? If only the other defendants are excluding the appellants from the lands, then there is no cause of action against the United States, unless it is one to vacate and annul the patent. The argument of appellant's counsel simply leads him around to the inevitable conclusion that this action is a direct attack upon the fee simple patents.

At page 15 of the brief counsel argues that if section 345 can not be construed to give the required consent to sue the United States, that such consent may be implied, and he cites Minnesota vs. United States 305 U. S. 382, 83 L. Ed. 235, 59 S. Ct. 292, and United States vs. Hellard 322 U. S. 363, 64 S. Ct. 985.

These two decisions hold that where an act of Congress has granted a right to maintain an action with respect to restricted Indian lands, of which the United States is the fee owner, without expressly granting consent to make the United States a defendant, that such consent may be implied. In the Min-

nesota case a statute granted Minnesota the right to condemn restricted Indian lands for the purpose of establishing highways across such lands. The Court held that consent to sue the United States would be implied from the particular statute even though the consent was not expressly given. In the Hellard case, an act of congress has provided that actions to partition trust patented and restricted lands of deceased Indians could be maintained in the State Courts of Oklahoma. The court held that since the United States was the fee owner of the lands, it was a necessary party to such partition proceedings, and that consent to sue the United States in the State Courts would be implied from the Act.

Appellants contend that their rights are based upon an agreement with the Blackfeet tribe made in 1887 and the General Allotment Act of 1887, and that consent to sue the United States to enforce such rights should be implied. The only relief which appellants seek from the United States is the emasculation of the fee patents, what we contend is cancellation of the fee patent.

Counsel gives no citation for this agreement of 1887. The Citation is Act of Congress of May 1, 1888, 25 Stat. at Large 113, Volume I Kappler on Indian Laws, page 261. In 1887 all of the land in Montana situated south of the Alberta border, north of the Missouri and Marias Rivers and Birch Creek, west of the Dakota border, and east of the Continental Divide of the Rocky Mountains was one vast Indian Reservation. The Act of May 1, 1888 ratified agreements made the year before with Indians located at the Fort Peck, Fort Belknap and

Blackfeet Agencies, whereby these three Indian Reservations were established with approximately their present boundaries and the Indians relinquished the remainder of the land. The same Act provided that if any Indian families had established homes and improvements upon land without the new reservation boundaries, that such Indians might have the land allotted to them, and receive a trust patent containing the terms of the allotment act of 1887. The plain terms of this act show that it has nothing whatever to do with allotments made within the boundaries of the new reservations, and the lands in question are within not without the new reservation. Both the agreement of 1887 and the Act of May 1, 1888, expressly forbade allotments in severalty among the Blackfeet.

The act of March 3, 1871, Revised statutes 2079, 25 U.S.C.A. 71, provides that no agreement or treaty shall be made with any Indian tribe upon the theory that such tribes are independent nations. Since 1871 all agreements with Indian tribes have been enacted as acts of Congress by passage in both houses and approval by the President. Ratification by the Senate alone is not sufficient.

The allotments in question were made to appellants under authority of the General Allotment Act of 1887 and the Act of March 1, 1907, 19 Stat. at Large 256, Vol. III Kappler on Indian Laws, page 286.

If the appellants have the rights they claim in this action, the rights must be based upon the general Allotment Act of 1887 and the decisions of this court which have already been cited and discussed.

The general allotment act does not provide for any action against the United States, save in section 345. That section not only provides that Indians may sue the United States if officers of the government refuse to make allotments or exclude the Indians from allotments, but it expressly provides that the action may be maintained in the district courts with the Indian as plaintiff and the United States defendant. There is no need to imply consent to sue.

The weakness in counsel's argument about implication of the right to maintain this action is: No Statute provides for a suit against the United States, upon the grounds that a fee patent is void and that other persons have excluded the Indians from the allotments. There is no right of action created and therefore no right to sue the United States can be implied. There is no act of Congress which provides for suits to annul fee simple patents, and therefore consent to sue the United States in such an action can not be implied. We have already shown that the United States should be the plaintiff not a defendant in an action to cancel a fee patent.

If the defendants other than the United States have excluded the appellants from their lands, without right, certainly ejectment can be maintained against such defendants, without joining the United States, if no collateral attack upon the fee simple patents is involved. Plainly such a collateral attack would be involved. In this action the validity of the fee patents is the main and not a collateral issue. In an action for ejectment or to quiet title without the United States as a party, the validity of

the deeds by which defendant claims title would be the main issue. Plaintiffs would have to introduce evidence dehors the patent record to prove that the patents were issued without application or consent or finding of competency, and such evidence can not be introduced in a collateral attack.

CONCLUSION

The complaint fails to state a cause of action for cancellation either of the fee patents or the voluntary conveyances of the plaintiffs or to establish the invalidity of either. The action is one to cancel and annul a fee simple patent and therefore, the plaintiffs can not maintain it because such an action can only be prosecuted by the United States as party plaintiff, and for the further reason that the United States has not consented to be sued as a party defendant. The order of the District Court that the action should be dismissed was right and should be affirmed.

The appellants' counsel says that appellants have requested the attorney general of the United States to commence an action in their behalf and the request was refused. It would seem that this officer believed the claims of the appellants were without merit; otherwise an action would have been commenced in the name of the United States.

Respectfully submitted.

MURRILLS AND FRISBEE
By Lloyd A. Murrills

Attorneys for Respondents,
J. L. Sherburne and Eula Sherburne,
His Wife.

No. 11591

In the United States Circuit Court of Appeals for the Ninth Circuit

FRED GERARD AND ROSE GERARD, APPELLANTS

v.

UNITED STATES OF AMERICA, J. W. SHERBURNE, ET AL., APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court in the first case which was dismissed on the ground that the United States, an indispensable party, had not been made a party, is reported in 62 F. Supp. 28. Its opinion in the instant case is reported in 69 F. Supp. 940.

JURISDICTION

This is a suit by which appellants seek to quiet title to certain lands against the United States and other parties. For the reasons stated in the Argument *infra,* it is believed that the district court did not have jurisdicton of this suit. Final judgment of dismissal for lack of jurisdiction was entered on February 8, 1947, and notice of appeal therefrom

was filed March 27, 1947 (R. 39–40).[1] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the United States has consented to be sued in an action seeking to establish immunity from taxation of allotments made to certain Indians.

STATUTE INVOLVED

Section 1 of the Act of August 15, 1894, c. 270, 28 Stat. 305, as amended, 25 U. S. C. sec. 345, provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any

[1] The judgment of dismissal is included in the record filed in this Court but was inadvertently omitted from the printed record.

> law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

Section 24 of the Judicial Code, 28 U. S. C. sec. 41 provides:

> The district courts shall have original jurisdiction as follows: * * *
>
> Twenty-fourth. Of all actions, suits or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.
>
> And the judgement or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him: * * *.

STATEMENT

This is an appeal from a judgment dismissing, upon motion of the defendants, a suit brought against the United States and various individuals by which appellants, Blackfeet Indians, sought to establish immunity of their lands from State taxation and to cancel certain tax deeds. Appellants sought to bring a similar action against some of the other defendants without joining the United States but this suit was dismissed on the ground that the United States was an indis-

pensable party, *Gerard* v. *Mercer,* 62 F. Supp. 28 (D. Mont. 1945). The facts, as alleged in the present complaint which was thereupon filed, may be summarized as follows:

Appellants were each allotted lands within the Blackfeet Indian Reservation and in February 1918, trust patents were issued to them pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388 and treaties with the Blackfeet Indians (R. 3–7). In June 1918, fee patents were issued to appellants in place of the trust patents (R. 7). The complaint alleged that these patents violated the terms of the trust and were issued without application by or consent of appellants (R. 7–8). Subsequently, Glacier County, Montana, levied taxes upon the lands which were not paid and the lands were sold to W. R. McDonald in 1930 (R. 10). The complaint alleged that the lands were not taxable and could not be mortgaged or conveyed by appellants without approval of appropriate federal officials (R. 11). It is asserted that the various individual defendants claim some interest in the land apparently through the deed to McDonald (R. 10, 12). The relief sought was that a decree be entered determining that the lands are immune from taxation and that appellants' trust title be quieted as against the claims of the individual defendants (R. 13–14).

The United States moved to dismiss for lack of jurisdiction and motions to dismiss on various grounds were filed by the other defendants (R. 15–18, 24–25). On February 8, 1947, the court wrote an opinion con-

cluding that it lacked jurisdiction of the action (R. 26–34). The action was accordingly dismissed and this appeal followed (R. 35–40).

ARGUMENT

The trial court correctly dismissed the suit as against the United States

Appellants rely upon the 1894 Act and Section 24 (24) of the Judicial Code as constituting a waiver of the immunity of the Federal Government from suit. The code provision represents simply an incorporation in the Judicial Code of the jurisdictional portion of the 1894 Act and is identical in scope with the 1894 Act. *First Moon* v. *White Tail,* 270 U. S. 243, 245 (1926); *Kennedy* v. *Public Works Administration,* 23 F. Supp. 771, 773 (W. D. N. Y. 1938); S. Rep. No. 388 pt. I, 61st Cong. 2d Sess. (1910) pp. 62, 63.

In *United States* v. *Eastman,* 118 F. 2d 421 (C. C. A. 9, 1941) certiorari denied 314 U. S. 635 (1941), this Court held that the 1894 Act did not permit a suit to enjoin the enforcement of certain timber-cutting regulations on trust allotments stating:

> It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right

> to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed.

So here, appellants are not asserting a right to an allotment which has been denied them. Rather they seek simply to review the administration of those allotments particularly with reference to taxation. The suggestion (Br. 16–17) that the *Eastman* decision has been overruled by the Palm Springs litigation which terminated in this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730 (C. C. A. 9, 1946) clearly lacks merit since that litigation concerned the right of Arenas to an allotment and not administration of the allotment after it was made.[2]

The language of the 1894 Act is plainly limited to suits to obtain allotments in the first instance. The parties are stated to be "the claimant as plaintiff and the United States as party defendant." The phrase "or who claim to have been unlawfully denied or excluded from any allotment," which is simply descriptive of the persons who may sue, does not enlarge the subsequent language of the Act.[3] The jurisdictional provision is limited to actions involving "the right * * * to any allotment." The Act then provides that the judgment "shall have the same effect,

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[2] The decision in *United States* v. *Hellard*, 322 U. S. 363 (1944) cited by appellants (Br. 17), is, as the trial court concluded (R. 31–33), plainly irrelevant since it related to special statutes governing the Five Civilized Tribes in Oklahoma.

[3] Like appellants here (Br. 13), the trial court in the *Eastman* case relied principally upon this phrase for the decision which was reversed by this Court.

when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." Obviously, the judgment sought by appellants could not be given any such effect.

Despite the restricted nature of the 1894 Act appellants argue that it should be given a broader meaning so that they may have a remedy (Br. 16). But, as this Court pointed out in the *Eastman* case "Enlargement of the right to sue the government for the redress of this character is solely a function of Congress." Cf. *Edwards* v. *United States* (C. C. A. 9, decided August 4, 1947). Moreover, adoption of appellants' contention would violate the settled rule that statutes waving sovereign immunity are to be strictly construed and enlargement of them by implication is not permissible, *United States* v. *Goltra,* 312 U. S. 203, 210–211 (1941); *United States* v. *Sherwood,* 312 U. S. 584, 590 (1941); *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654 (1947).

Thus, the dismissal of the suit as against the United States was clearly correct. The Government is not concerned with the issues arising between appellants and the individual defendants. Consequently, we shall not discuss the question whether the motions to dismiss filed by those defendants were well taken. However, we believe that attention should be called to the fact that, since jurisdiction may not be rested upon Section 24 of the Judicial Code, no basis for Federal jurisdiction appears. There is no allegation that more than $3,000 is involved and the complaint affirmatively alleges that the individual defendants are residents of Montana (R. 4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below insofar as it dismisses the suit against the United States, is clearly correct and should be affirmed.

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AUGUST 1947.

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No. 11591

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Appellees.

REPLY BRIEF

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Upon Appeal From The District Court
Of The United States
For The District Of Montana

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Appellees.

REPLY BRIEF

I.

TO ANSWER BRIEF OF THE UNITED STATES

Appellants submit two questions:

(a) May an Indian Ward excluded from his allotment by having had a Fee Patent forced upon him by The United States, prior to the expiration of the primary trust period, without application therefor, or consent to its issuance, have a right to seek redress by making The United States a party to a suit to quiet the title and, if need be, make The United States a

Party Defendant to accomplish that object. That the policy of issuing **forced fee patents** upon Ward Indians, prevailing from 1917 to about 1920, was erroneous was acknowledged by Congress in the Enactment of Section 352a Title 25 U. S. C. A., 44 Stat. 1247, Feb. 26, 1927 c.215. It is not reasonable to hold that the Appellants be deprived of the right to their day in Court. They are citizens of the United States and are seeking to protect their claim to property, of which they have been deprived wrongfully without any authority of law.

The Brief of The United States does not cite any authorities contrary to those the Appellants cited in their Brief at pages 9-20. The argument of counsel for The United States would deprive the Appellants of redress. The courts have rightly resolved doubts in favor of the Indians. A great many of such cases have been considered by this Court.

Only Ward Indians and their rights under Federal Laws and Treaties are involved herein, and Judge Pray in his Order Dismissing the Complaint on the former trial rightly held that the Court had jurisdiction if The United States was not a necessary party. Gerard v. Mercer et al, 62 F. Supp. 28 (D. Mont. 1945). We believe the Court erred in that case by holding that The United States was an indispensable party. The United States is not actually and in person or by any officer excluding the Appellants from their allotments; it was instrumental only in issuing a fee patent prior to the expiration of the trust period, without

application or consent or a finding of competency. The purchaser of the tax deed was and is charged with notice of the law and purchased at his own risk—all identical with purchaser of Mineral Royalty, reserved to the Tribe by law but not reserved in the fee patent issued by the United States. United States v. Frisbee, 57 F. Supp. 299. The United States in forcing fee patents on the Blackfeet Indians did them as grave an outrage and injury as was inflicted upon the Mission Indians involved in the Arenas case: "Conversion, civilization, neglect, outrage." The Secretary of the Interior insists, in the face of the holding of this Court, in the case of U. S. v. Glacier County, 17 F. Supp. 411, 99 Fed. 2d 733, in upholding the wrongful acts of the Department of Interior in forcing the fee patents on the Blackfeet Indians in 1917-1920. For a general discussion of this subject see Felix S. Cohen's Handbook of Federal Indian Law pp. 226-227 and 258-259.

(b) Does not a Ward Indian have a right to quiet title to lands allotted to him and from which he has been excluded during the Trust Period, as the result of a fee patent forced upon him and a subsequent tax deed; does he not have a right to prosecute an action in his own name and right without making The United States a party to the action, particularly so where the United States has neglected or refused to prosecute on behalf of the Indian Ward. If Sec. 345 of 25 U. S. C. A. does not give such permission

then it should be held to be by necessary implied authority to have his day in Court.

II.

ANSWER BRIEF OF DEFENDANTS FRARYS AND MERCERS

(Hall and Alexander)

This brief relies on lack of jurisdiction in the Federal Court, pp. 3-5. It sets up no diversity of citizenship and cites only Montana Code provisions and three Montana cases; none are in point as we view the facts. The four Federal cases they rely upon which are cited upon pages 4 and 5 of their brief are inapplicable as they do not involve Indians Wards or Federal law pertaining to the Indian questions involved. This brief likewise ignores the Ward Indian feature of the case and the forced fee patents and alleges the Complaint is a **collateral attack** on a **fee patent.**

The case of Chatterton v. Lukin cited by these defendants, is not an authority here because in that case the record shows the fee patent was **applied for.**

The Montana authorities cited by Appellants at page 8 of their brief do not support their contentions as to the Complaint here being a collateral attack for the reason that a collateral attack applies only to a Federal fee patent being **issued** under **authority** of law. In Mouat v. Minn. M. & S. Co. 68 Mont. 253, 217 P. 342, (page 8 of Defendants Brief) the Montana Court at page 260 said:

> "But there is likewise another rule equally well established, and with respect to which the Courts are practically harmonious: That where land is not owned by the United States or has been appropriated to a particular use, or reserved from sale, the land officials are without jurisdiction to dispose of it, and if, **in defiance of law,** a patent issue to it, the same is **ineffectual to pass title** and is **void** from the beginning, and in such case may be assailed in an action at law, and like any **void** judgment may be attacked collaterally." (Italics ours).

This Court has held that the forced fee patents issued to the Blackfeet Indians were and are **void.** United States v. Glacier County cited in Appellants brief.

> "Time does not confirm a void act." Sec. 8768 Revised Codes of Montana, 1935.

Estoppel, Statutes of Limitations or Repose do not run against The United States or an instrumentality thereof. Board of Commissioners of Jackson County Kansas v. United States 100 F. 2d 929. The lapse of twenty-seven years, complained of by these defendants at page 6 of their brief, is of no moment.

Chatterton v. Lukin is not applicable as the Indian made application for a fee patent and that was believed by the Court, but denied by Lukin; The last three cases cited by these defendants at page 8 of their brief do not appear in point as they do not involve Indian Wards or Indian lands or **forced fee patents** prematurely forced on the Indian. The case

of Larkin v. Paugh, cited at page 9 of Defense brief involved heirs of an Indian Ward who had applied for a fee patent, and died before it was issued and delivered. Appellants have found none of the jurisdiction cases cited by these defendants in point as to the question raised by Appellants: "Forced fee patents, taxes levied on land during the period of restriction, a tax deed to the County for delinquent taxes so levied."

Under the head of State Statutes of Limitations these Defendants urge: "appellants are precluded from recovery" and cite Sec. 347, Title 25 U. S. C. A. and 9015 of the Mont. Code for 1935. Neither of these sections apply. Nor are the cases cited at pages 10 to 13 in point as each of those citations involves other and different questions not pertinent to the Ward Indian question alleged in appellants complaint.

The only question before this Court at this time is the right of the Indian Complainants to maintain a suit as against The United States it if is an indispensable party, or as against individual defendants claiming any interest in, or possession of the land. The first case was dismissed because The United States was not a party and was held to be a necessary party; The Appellants then commenced a second action and the defendants seek a dismissal because the United States did not **consent** to the suit against it. Thus they put the maltreated Indian in a dilemma—he is deprived of his property and made an outcast and a mendicant whatever way he moves. We submit such

is not the view of the Federal Courts—today more liberal than ever before. In the case of Ward v. Love County, 253 United States 17, 64 L. Ed. 751, Ward and **sixty-six other Indian plaintiffs** sued to recover taxes paid Love County on their allotted lands and recovered. The United States was not held to be a **necessary** party.

In the case of United States v. Nez Perce County, Idaho, 95 F. 2d. 232, (1938) this Court considered the same question presented here with the exception that it was prosecuted by the United States on behalf of its Indian Wards. This Court said:

> ". . . . . The Allotment Act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; Ward v. Love County, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751; United States v. Benewah County, 9 Cir., 290 F. 628; Morrow v. United States, 8 Cir., 243 F. 854; Board of Com'rs of Caddo County v. United States, 10 Cir., 87 F. 2d. 55; United States v. Dewey County D. C., 14 F. 2d. 784; United States v. Comanche County, D. C., 6 F. Supp. 401; United States v. Chehalis County, D. C. 217 F. 281. Treaties with Indians, and acts of Congress relative to their rights in property reserved to them have always been

liberally construed by the courts. The dependent condition of these wards of the government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor. This court in United States v. Benewah County, supra, as early as 1923 declared that the Act of May 8, 1906, should be held to mean that the action of the Secretary of the Interior authorized by it can be had only on the application of the allottee or with his consent. The Act of February 26, 1927, was little more than a statutory recognition of the principle there announced. The fee patent in the present instance was issued during the trust period, or at least during an extension of that period. It follows from what has been said that, if it was issued to Carter without his application or consent, his land remained immune from taxation during the whole of the time from 1921 to 1932, and the lien of the county should be held void. (Pp. 235-236)."

Appellants are satisfied that Estoppel, and the Statute of Limitations are not available against a Ward Indian seeking to protect his statutory right to his allotted lands. We do not believe the authorities cited by these defendants are applicable, or at all in point. Appellants authorities have not been disputed or shown to be untrue.

III.

ANSWER BRIEF OF DEFENDANTS, SHUPE AND McCONAHA

(Donovan and Werner)

The trusteeship relation existing between The

United States and its Indian Wards is not that of the ordinary business trust. It is special and exists by virtue of Treaties with the Blackfeet Indians and imposes a duty upon The United States which it has neglected to enforce in regard the Appellants. The Appellants, by reason of Treaties or Agreements and Statutes cited in their Complaint are an instrumentality of the United States. They are held to be **non sui juris** but have the right to sue and may be sued. The Neglect of the United States to abide by the law and protect their property rights should not be held to divest them of their rights to property allotted to them under the General Allotment Act cited in their Complaint. This Court has repeatedly held that Congress had no power to divest Indians of vested rights. Section 352 and 352a and 352b Title 25 U. S. C. A. are **subsequent Acts** and have no pertinence to the issue set out in the Complaint.

The brief of Shupe and McConaha presents no other new or different matter not already discussed in Appellants brief and the Answer brief of the United States and the Brief of Hall and Alexander previously discussed herein.

IV.

ANSWER BRIEF OF J. L. SHERBURNE AND EULA SHERBURNE

(Murrills and Frisbee)

In the brief of J. L. Sherburne and Eula Sherburne

the same issues are raised as in the other briefs already discussed, viz:

1. Complaint does not state a cause of action.
2. Collateral attack on a fee simple patent.
3. The United States is an indispensable party.

The argument under No. 1 above has been met in Appellants Brief and the Answer Briefs already discussed. Much of the matter in the brief under this head is inapplicable and only material under an Answer and a trial on the merits. The theory of these defendants is based on Sections 349-352, 352a and 352b of Title 25 U. S. C. A. enacted subsequent to the vested rights acquired by these appellants. We cannot agree with counsels' theory of the case of U. S. v. Glacier County at pages 7-10 of their brief. They urged the same theory in another action in the Montana Court and the Montana Court did not agree with their view, and made a careful and able analysis of the forced fee patent and taxation of the same on the Blackfeet Indian Reservation in a case involving taxation of fee patent land and did not agree with the theory of the same counsel. Glacier County et al, v. Frisbee et al 164 P. 2d 171, —Mont—.

2. Counsel urge under this section that the Complaint is an attack on a fee patent issued by the United States—a collateral attack. This argument has already been discussed in considering the previous Answer Briefs and we submit that the authorities they cite are not applicable and that the argument is untenable.

3. **The United States has not consented.** This fea-

ture of the case has been considered in the Briefs of of Appellants and other Defendants and needs no additional consideration under this head.

CONCLUSION

It seems that the Appellants have been the victims of **neglect** and **inaction** on the part of the Interior Department. The decision of this Court in Glacier County v. United States, supra, was correct and should have been followed up promptly by the Department to correct the wrongs inflicted on the Blackfeet fee patentees some twenty-seven years ago. But a policy of inaction and gross neglect has been the fact. Unrevealed commercial interests of non-Blackfeet, post traders very likely, have been permitted to enrich themselves at the expense of these Appellants and other Blackfeet. The United States and these Defendants do not want to be disturbed in the policy of commercialism and profit at the expense of the **long-suffering Blackfeet Indians.** They allege all sorts of old and new **super-technicalities** as to parties and pleadings to dismiss this and other actions. We submit that the Complaint contains sufficient allegations to put them on their defense so that justice may prevail.

We submit that the lower Court erred in dismissing the Complaint on any ground. If the United States may not be sued in this action, at least the action should proceed against all of the other defendants. Otherwise there is no likelihood that this generation

of Blackfeet will ever enjoy justice and the protection the United States promised them by Treaty and Statute since 1855.

Respectfully submitted,

S. J. Rigney,

Attorney for Appellants.

No. 11,592

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARMON M. WALEY,

Appellant,

vs.

JAMES A. JOHNSTON, Warden,
United States Penitentiary,
Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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No. 11,592

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENTS.

This is an appeal from an order of the United States District Court for the Northern District of California, hereafter called the "Court below", denying Appellant's petition for writ of habeas corpus and discharging the order to show cause. (Tr. p. 21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

STATEMENT OF THE CASE.

The Appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. pp. 1-7) and the Court below issued an order to show cause. (Tr. p. 8.) Thereafter the Appellee filed a return to order to show cause (Tr. pp. 9-10) and a memorandum of points and authorities in support thereof, contending that the petition should be denied on the basis of prior denials in several habeas corpus applications heretofore filed by the appellant (Tr. pp. 11-14). The Appellant then filed a reply to return to order to show cause (Tr. pp. 15-21). The matter was submitted and the Court below filed its written order denying the petition for writ of habeas corpus and discharging the order to show cause. (Tr. p. 21). From this order appellant now appeals to this Honorable Court. (Tr. p. 25.)

QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

CONTENTION OF APPELLEE.

The answer to the above stated question is: NO.

ARGUMENT.

The facts leading up to the filing of the instant petition are set forth in the decision of U. S. District Judge Louis E. Goodman, denying petition for writ of habeas corpus in case No. 24837-G (civil) (Tr. pp. 11-13) and a similar order entered on August 6, 1945, by this Honorable Court in an undocketed case involving the Appellant herein (Tr. p. 13). The Court below, in denying the instant application declared:

> "The instant petition is petitioner's fifteenth application for writ of habeas corpus filed before Federal Courts in the Ninth Circuit and in it he alleges nothing other than that which he has heretofore urged as grounds for his release.
>
> "Although res judicata does not apply in habeas corpus proceedings, a prior refusal to discharge on a like petition may be considered and give controlling weight." (Tr. p. 21.)

In support of its order, the Court below cited as authority the decisions in this Honorable Court in the following cases:

Swihart v. Johnston, 150 F. (2d) 721; Certiorari denied 327 U. S. 789;

Garrison v. Johnston, 151 F. (2d) 1011; Certiorari denied 328 U. S. 840;

Wilson v. Johnston, 154 F. (2d) 111; Certiorari denied 328 U. S. 872;

McMahan v. Johnston, 157 F. (2d) 915; Certiorari denied April 28, 1947.

In reliance on these decisions of this Honorable Court and in further reliance on the later decision of this Court, sitting en banc, in the case of *Price v. Johnston,* No. 11,334, decided May 5, 1947, Appellee asserts that on the record before it, the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on the order to show cause.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying petition for writ of habeas corpus was correct and should be affirmed.

Dated: San Francisco, California,
June 27, 1947.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

Attorneys for Appellee.